

T H E
FREDERICIAN CODE;
O R,
A B O D Y O F L A W
F O R T H E
D O M I N I O N S

O F
The K I N G of P R U S S I A.

Founded on Reason, and the Constitutions of
the Country.

Translated from the F R E N C H.

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FREDERICIAN CODE

A BODY OF LAW

DOMINION



IN TWO VOLUMES

VOLUME II

ED. J. M. R. G. H.

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C O N T E N T S.

P A R T II.

B O O K III.

	Page
TIT. I. C oncerning the subject of this third book, and the order observed in it,	1
TIT. II. Of the origin of civil property, and other real rights,	3
TIT. III. Of the method of acquiring civil property by emphyteusis, or a long lease,	8
TIT. IV. Of the method of acquiring civil property, by raising an edifice on a surface, or by making any other use of the same surface,	24
TIT. V. Of the way of acquiring civil property by prescription,	29
ART. I. Of the prescription called in law <i>usucapion</i> ,	30
ART. II. Of the prescription which takes place by a possession of thirty or forty years,	52
ART. III. Of the prescription which takes place by a possession of time immemorial,	58
TIT. VI. Of the civil property which creditors have in the effects which their debtor has alienated to defraud them,	62
TIT. VII. Of the method of acquiring civil property by a person who, not being proprietor of the thing, comes to lose the possession of it, when he was in a way, and had a right to acquire it by prescription in the way of <i>usucapion</i> ,	74
TIT. VIII. Containing some other methods of acquiring civil property, and the places in which they are treated,	78

B O O K IV.

TIT. I. Subject of the fourth book;	79
TIT. II. Of the second real right, or of servitude in general,	81
TIT. III. Of the personal servitude, which takes place by the constitution of an usufruct, or <i>liferent</i> ,	88
TIT. IV. Of the usufruct of things which perish, and are consumed by use,	103
TIT. V. In what manner an usufructuary is to give security, and what sort of security he is to give,	107
TIT. VI. Of the time in which a person is intitled to use his right of usufruct,	114
	TIT.

	Page
TIT. VII. Of the actions granted by the laws to a man who affirms that an usufruct is established in his favour, as well as to him who denies that he is obliged to allow his subject to be liable to such a servitude,	116
TIT. VIII. Of the second personal servitude, by which the use of a thing or subject is given to a man for his daily necessities,	<i>ib.</i>
TIT. IX. Of the third personal servitude, which consists in inhabitation,	120
TIT. X. Of real servitudes,	124
ART. I. Of servitudes granted in favour of city subjects or heritages,	134
ART. II. Of servitudes granted in favour, and for the use of lands, or rural heritages,	142
TIT. XI. Of the actions acquired by servitudes both personal and real; also of such as the laws allow to those who deny that such a right of servitude is due to another,	150
TIT. XII. How servitudes are extinguished,	156

BOOK V.

TIT. I. Summary of the fifth book,	163
TIT. II. Of the meaning given to the words pledge or mortgage, of the way of constituting them, and of the effects which they produce,	164
TIT. III. Of tacit pledges or mortgages, and of the cases in which they are tacitly constituted,	173
TIT. IV. Of the things which may be pledged or mortgaged,	174
TIT. V. Of the preference allowed in a competition of creditors, to such as have a right of pledge or mortgage,	177
TIT. VI. Of the alienation and sale of pledges, and immoveable subjects mortgaged,	<i>ib.</i>
TIT. VII. Of the methods by which pledges are extinguished,	183

BOOK VI.

TIT. I. Summary of the sixth book,	187
TIT. II. Of the fourth real right, which is acquired by the method of succession or inheritance; and of the origin of successions,	189
TIT. III. Of the first order of succession without will, namely, of the succession of descendants,	193
TIT. IV. Of the second order of succession without will, namely, that of ascendants,	201

CONTENTS.

	Page
TIT. V. Of the third order of succession, namely, of the succession of collaterals,	204
ART. I.	<i>ib.</i>
ART. II. Of the succession of the children of brothers-german,	205
ART. III. Of the succession of half-brothers or half-sisters,	206
ART. IV. Of the succession of the children of half brothers and sisters,	<i>ib.</i>
ART. V. Of the succession of uncles and aunts, both on the father's side and mother's side,	207
ART. VI. Of the case in which the widow of the defunct succeeds without will, by virtue of a right peculiar to herself,	208
ART. VII. Of the cases in which the exchequer succeeds to the effects of persons dying intestate,	209

BOOK VII.

TIT. I. Subject of the seventh book,	212
TIT. II. Of testaments or settlements of last will in general,	215
TIT. III. Of the solemnities or exterior formalities which ought to be observed in the making up a judicial will,	228
ART. I. Of the solemnities or exterior forms which shall be observed when a person wants to make by word of mouth his testamentary settlements before a judge,	229
ART. II. Of the solemnities or exterior forms to be observed in wills presented in a court of judicature,	233
TIT. IV. Of the interior solemnities of wills, namely, of the nomination of an heir, and, in particular, of the obligation to nominate and appoint for heirs children and parents,	235
ART. I. Of the voluntary nomination of an heir,	236
ART. II. Of the necessary nomination of an heir,	246
TIT. V. Of disinheriting of children and of parents,	251
TIT. VI. Of the objection or complaint of undutifulness,	260
ART. I. Of the legitim,	267
TIT. VII. Of substitution,	272
ART. I. Of vulgar substitution,	273
ART. II. Of pupillary substitution,	276
ART. III. Of the substitution which lawyers call supposed pupillary or exemplary,	282
ART. IV. Of military substitution,	285
TIT. VIII. Of successions in trust,	286
TIT. IX. Of mutual wills between husband and wife,	301
TIT. X. Of stipulated succession,	304
TIT. XI. Of privileged wills,	307
ART. I. Of military wills,	308
ART.	ART.

	Page
ART. II. Of a parent's will among his children,	314
ART. III. Of wills made in time of pestilence, or other contagious distempers,	316
TIT. XII. Of codicils, codicillary clauses, and donations in prospect of death,	319
TIT. XIII. Of the conditions under which the nomination of an heir may be made,	322
TIT. XIV. Of the opening and publication of wills,	334
TIT. XV. Of entering upon the inheritance, of the right of deliberating, and of the benefit of an inventory,	337
ART. I. Of the space for deliberating,	346
ART. II. Of the benefit of inventory,	347
TIT. XVI. Of the collation or communication of effects,	350
TIT. XVII. Of wills null in themselves, and of the methods of invalidating a valid will,	367
ART. I. Of the cases in which a will is made void, vacated, or disappointed,	370
ART. II. Of the manner in which a will becomes what is called in law <i>irritum</i> , of no effect,	373
ART. III. Of the manner in which a will is invalidated for want of the acceptance of the inheritance by the heir,	<i>ib.</i>
ART. IV. Of the cases in which an heir is reckoned not to have been nominated heir,	374
ART. V. Of the cases in which the heir is deprived of the succession, as being unworthy of it,	<i>ib.</i>
ART. VI. Of the cases in which a valid will is annulled and made void,	376
TIT. XVIII. Of the action by which a succession may be demanded and obtained,	377
TIT. XIX. Of the action of an heir against his coheir,	390

BOOK VIII.

TIT. I. Subject of the eighth book,	395
TIT. II. Of legacies,	397
TIT. III. Of annual and monthly, &c. legacies,	427
TIT. IV. Of the legacy of a personal servitude,	433
TIT. V. Of the legacy of a real servitude,	439
TIT. VI. Of the legacy of the portion which a husband preferably leaves to his wife,	441
TIT. VII. Of the legacy which a creditor leaves to his debtor to free him of what he owes him,	444
TIT. VIII. Of the legacy of option,	448
TIT. IX. Of a legacy of land, or of a country-estate in general, or of a stocked farm or estate, that is to say, provided and furnished, or of the inventory of an estate,	450
TIT.	

CONTENTS.

vii

	Page
TIT. X. Of the legacy which a testator leaves of his gold, of his silver plate, of his ready money, of his cloaths, of his jewels, and of the other things which he has for dress,	453
TIT. XI. Of a legacy of household furniture,	457
TIT. XII. Of the legacy of the stock of family-provisions,	458
TIT. XIII. Of legacies of grain, of wines, and of oil,	460
TIT. XIV. Of the legacy of maintenance or alimony, and of that of food,	464
TIT. XV. Of the legacy of a peculiar,	473
TIT. XVI. Of the conditions, and descriptions, <i>likewise</i> of the causes and motives, or burdens, which testators may annex to legacies,	474
TIT. XVII. Of the day on which a legacy becomes due to the legatary,	481
TIT. XVIII. Of the security which the heir is bound to give on account of the legacies,	485
TIT. XIX. Of the different methods of annulling and invalidating legacies,	489
ART. I. Of the method of annulling the legacy by revoking it,	490
ART. II. Of the cases in which a legacy falls of itself,	496
ART. III. Of legacies conceived in obscure and doubtful expressions, and of the way of interpreting them,	498
ART. IV. Of the case in which a legacy is invalid at the time of making the will, and in which the defect which rendered it null, happens to cease before the testator's death,	499
ART. V. Of the cases in which legacies are reckoned as if they had not been left or written,	502
ART. VI. Of the cases in which a legatary is deprived of the legacy on account of unworthiness,	503
ART. VII. Of the cases in which a testator has been mistaken in the person of the legatary, or in the thing bequeathed,	505

A

1	THE HISTORY OF THE
2	3
4	5
6	7
8	9
10	11
12	13
14	15
16	17
18	19
20	21
22	23
24	25
26	27
28	29
30	31
32	33
34	35
36	37
38	39
40	41
42	43
44	45
46	47
48	49
50	51
52	53
54	55
56	57
58	59
60	61
62	63
64	65
66	67
68	69
70	71
72	73
74	75
76	77
78	79
80	81
82	83
84	85
86	87
88	89
90	91
92	93
94	95
96	97
98	99
100	101
102	103
104	105
106	107
108	109
110	111
112	113
114	115
116	117
118	119
120	121
122	123
124	125
126	127
128	129
130	131
132	133
134	135
136	137
138	139
140	141
142	143
144	145
146	147
148	149
150	151
152	153
154	155
156	157
158	159
160	161
162	163
164	165
166	167
168	169
170	171
172	173
174	175
176	177
178	179
180	181
182	183
184	185
186	187
188	189
190	191
192	193
194	195
196	197
198	199
200	201
202	203
204	205
206	207
208	209
210	211
212	213
214	215
216	217
218	219
220	221
222	223
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226	227
228	229
230	231
232	233
234	235
236	237
238	239
240	241
242	243
244	245
246	247
248	249
250	251
252	253
254	255
256	257
258	259
260	261
262	263
264	265
266	267
268	269
270	271
272	273
274	275
276	277
278	279
280	281
282	283
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288	289
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PART II. BOOK III.

TITLE I.

Containing the subject of this third book, and the order observed in it.

§ 1.

THE civil laws, after settling the natural methods of acquiring property mentioned in the preceding book, have found it necessary, on account of certain circumstances, to allow possessors a kind of property, or another real right; though, according to the law of nature, they have only a personal right, (*jus personale.*)

§ 2.

In title II. we shall treat of the origin of civil property (*dominii civilis*), and of other real rights.

§ 3.

In title III. shall be shown how the civil or advantageous

tageous property is acquired by a lease-holding, (*de emphyteosi.*)

§ 4.

In title IV. shall be explained the subject of superficies or surfaces (*de superficie*), and the civil or advantageous property which arises from them.

§ 5.

In title V. shall be shown how civil property is acquired by prescription, (*de usucapione et præscriptione.*)

§ 6.

In title VI. we shall explain the civil property which creditors get in things alienated by their debtor to their prejudice, and which they may redemand, by virtue of the Paulian action, from a possessor who has been participant in the fraud.

§ 7.

In title VII. shall be shown how a man who is in a course of getting a thing by prescription, of which consequently he is not the owner, if he happen to lose the possession of that thing, is nevertheless reputed its civil proprietor (*pro domino civili*), in so far as he may redemand it by a Publician action from all such as have a less title to possess it than his own, (*de Publiciana in rem actione.*)

§ 8.

In fine, in title VIII. shall be shown, that, according to the civil laws, property is also acquired by investiture, by delivery of the portion, by a testamentary settlement, and by other methods.

T I T L E II.

Of the origin of civil property, (dominii civilis), and other real rights.

§ 1.

FROM a principle of equity the Roman laws have reckoned among real rights several things and agreements (*negotia*), which produce according to the law of nature only a personal action, and have attributed to them the civil property (*dominium civile*), or any other real right.

§ 2.

I. A person has, for example, granted the civil property in matters or treaties, in virtue of which the real proprietor of an estate yields the enjoyment and use of it to another for ever, or at least for a very long time; as happens in agreements which grant to another a right of lease-hold, of surface, or of fief, &c. (*jus emphyteuseos, superficiei, &c.*), upon an estate which belongs to us. Were it not for this disposition of the laws, it would have happened that a person to whom so long an enjoyment of another's fortune had been granted, would not have been able to defend himself against such as might have disturbed him in the possession or enjoyment of that fortune, nor to raise against them any action, even though they had entirely robbed him of it. There would have been no other remedy in law but that of having recourse against their author; that is to say, against the person from whom they had got the estate and the right to enjoy it, and to raise against him a personal action, either to cause the estate to be restored to us by the person

who has disturbed us in our possession, or to yield to us the right which he has of suing it at law. All this would have been still subject to greater difficulties, supposing the author dead, and that he had left several heirs very distant from each other.

To prevent such confusion, the laws have attributed to this long enjoyment a kind of property, called civil or fictitious, (*dominium sive utile sive fictum*), granting in consequence to the leaseholder, to the person called *superficiarius*, or who has built a house on another's ground, and to the vassal, &c. the profitable claim of right, (*rei vindicationem utilem*), by which they may sue immediately the person who occasions the disturbance, and redemand their civil property, without the necessity of using the personal intervention of their author or guaranty. This is the reason which the Roman laws have had to grant, on this occasion, a real action, and which they have given in the express terms of their decision *.

§ 3.

II.) The laws have decreed, in the second place, a kind of property in favour of certain persons, or of certain causes, (*in favorem personæ vel causæ*;) for example, in favour of pupils, of minors under age, of pious uses, of soldiers, of a portion, of married women, (*in favorem pupilli, minoris, piæ causæ, militis, dotis, uxoris*), allowing in these different cases to raise the profitable claim of right. This sort of property was mentioned in the title of claim of right.

* L. I. § 8. *De superfic. ib.* Si quis enim in superficiæ usu turbabatur, actione perionali ex conducto vel emto cum domino agere, et dominus cedere suas actiones superficiario tenebatur: sed longe utilius visum est (quia melius est possidere quam in personam experiri) quasi in rem actione experiri. Atque ideo prætor actionem realem inde dedit.

§ 4.

III.) The laws have, in the third place, decreed, that, in certain cases, the real proprietor of a thing should be deprived of his right of property as a punishment of his fraud, and that the property should fall to him who had no right to the thing. For example, when a debtor alienates his effects, or part of them, to the prejudice of his creditors, in favour of a third person who is in connivance with him, the laws, in punishment of such a fraud, adjudge to the creditors the property of the things alienated.

§ 5.

IV.) The laws have, in the fourth place, feigned and observed sometimes, from a principle of equity, a right of property in cases, where, by the nature of the affair, there was no obligation.

It is from a principle of equity, for example, that they have granted the Publician action, (*in rem Publicianam.*)

In fact, one who possesses honestly, (*bona fide*), and upon a just title, a thing belonging to another, and who has consequently a right to let the prescription of it run, if he happen to lose possession of it, though unjustly, cannot acquire it by usucapion.

Nevertheless, that, by the unjust deed of a third person, he may not lose his right to the thing, the laws have granted to him the real action called *Publiciana in rem actio*, against all such as, in order to assume to themselves possession of thing, have a less title than his own. By virtue of this action, the possessors of the thing are obliged to restore it to him, and consequently to put him in a condition to complete his right by prescription.

§ 6.

V.) The laws have, in the fifth place, granted to
testamentary

testamentary heirs and legataries a right of property quite unknown in the law of nature, but founded on the allowed use of wills. The civil laws have, in consequence, authorised heirs to sue in virtue of the action called *hereditatis petitio*, which is in part real, and derived from the right of property, supposing that the heir makes with the defunct but one single person, who ought consequently to continue the enjoyment of the defunct's right of property.

To favour testamentary settlements, they have likewise granted to the legatary a claim of right, besides the personal action arising from the will, (*actionem personalem ex testamento.*)

§ 5.

VI.) The laws have also, in the sixth place, comprehended, from a motive of equity, among real rights other affairs, which, of their own nature, would have produced only a personal action, by which possessors have been allowed to use all real rights, excepting that of property.

For this reason, servitudes (*servitutes*) have been reckoned among real rights. For the use of a servitude being evidently to turn to the advantage of a third party, or of his grounds, the person who had the right of servitude must have the right of raising a real action, against all such as should disturb him in the exercise of that servitude. See above, § 1.

§ 8.

VII.) It is, in the seventh place, from the same principle of equity, that the laws have reckoned a pledge and a mortgage, or hypothec, (*pignus et hypothecam*), among real rights, and have granted to a creditor a real action, which provides better for his security, and allows him to redemand, in his own name, the thing engaged, without the necessity of applying to the person who laid it in pledge.

§ 9.

§ 9.

VIII.) In fine, it is also from a motive of equity, that the laws have even allowed to persons who have only a personal action, to raise it against any possessor. Of this nature are the actions called *in rem scripta*, among which is the action *quod metus causa*, for the reason expressed in the law itself, that a man on whom violence is committed is so frightened and terrified, that he scarcely sees the person who puts him in fear, and that it would consequently be unjust to oblige him to restrict himself to the very person of the robber, whom he does not know*.

Among these actions are also reckoned,

The action of exhibition, (*ad exhibendum*); for to be intitled to claim a thing, a man must be assured that the person whom he wants to sue possesses it, and one can come at this assurance only by means of an exhibition of the thing.

The actions called *noxales*; because these actions have not so much in view the owner of the animal as the animal itself †.

The action *de aqua, &c. arcenda*; because no person can remedy the inconveniencies which waters occasion, but the possessor of the subject ‡.

In fine, interdicts; because nobody can show that he possesses a thing, nor restore the possession of it, unless he possess it in fact ||.

These actions are, and continue personal, having the effect of real rights only, in so far as they may be raised against any possessor of the thing in question.

* L. 14. § 3. *Quod. met. caus. ibi*: Nam cum metus habeat in se ignorantiam propter mentis trepidationem præsentis vel futuri periculi, (l. 1. ff. *ead.*), merito quis non adstringitur ut designet quis ei vim vel metum adhibuit, &c.

† L. 1. § 12. Si quadr. paup. l. 7. § 1. *Damn. inf.*

‡ L. 1. § 12. de aqua et aq. plur.

|| L. 1. § 3. ff. interdict.

T I T L E III.

*Of the method of acquiring civil property by emphyteusis,
or a long lease.*

(De jure emphyteutico.)

§ 1.

BY emphyteusis is understood either the long lease, (*contractus emphyteuticus*), or the leasehold-right, (*jus emphyteuticum*.)

§ 2.

Emphyteusis, or a long lease, (*contractus emphyteuticus*), is a contract completed by the consent of the contracting parties, (*contractus consensualis*), by which the proprietor of an heritage promises to another that he will allow him the full enjoyment of it, on condition that he shall maintain and improve it, and pay him a certain yearly rent, as an acknowledgment of his right of property. Thereby a man to whom a leasehold-right was promised, obtains only a personal action, (*actionem personalem*.) See below, § 15.

§ 3.

But when the proprietor of the heritage has delivered in consequence to the leaseholder, the latter acquires by that delivery a real right, which is called the advantageous property, (*dominium utile*.) The reason of this has been seen in the preceding title. See § 15.

§ 4.

Emphyteusis differs, in the first place, from a lease on a quit-rent in this, that he who grants to another an heritage, with the burden of paying a certain quit-rent (*pro censu*), transfers to him the real property of it;

it; and by consequence this last pays the quit-rent to the superior of an heritage, which belongs to himself in property.

The effect of this difference is, that the owner of the heritage subject to a quit-rent may alienate it without the consent of the preceding proprietor, and that he does not lose his property for having neglected to pay its quit-rent.

§ 5.

Emphyteusis differs, in the second place, from leasing, or letting out for farm, in this, that the yearly rent for which the leaseholder is bound, is not paid as in leasing or letting out for farm, for the enjoyment of the subject or heritage, but in acknowledgment of the right of property, (*dominii utilis*), which is the essence of the emphyteusis. Besides, leases for farm are contracted usually but for a few years; and consequently the reason which made the emphyteusis to be included in real rights, does not take place with respect to them.

In a doubtful case an agreement would be reckoned a lease for farm, unless the word *emphyteusis* were expressed in the writing, in which case it would be a real emphyteutical contract or long lease; even though it were stipulated, that the yearly rent should be paid in proportion to the fruits, or though the agreement were made but for a short time.

§ 6.

Emphyteusis differs, in the third place, from a contract executed with regard to the right of surface or superficies (*de superficie*) in this, that the leaseholder may enjoy the grounds, plant trees and vineyards upon them, sow them and reap the fruits; whereas one who is called *superficiarius*, and builds on another man's ground can only dispose of the surface.

§ 7.

In fine, emphyteusis differs, in the fourth place, from usufruct in this, that the usufructuary acquires the civil property, (*dominium civile*), and has the enjoyment of a subject, without paying a yearly rent for it.

§ 8.

The right of emphyteusis, or a long lease, goes to all the heirs, not excepting the testamentary, but not to singular successors, (*successores singulares*); which takes place with respect to all estates, both ecclesiastical and secular.

This rule however, admits an exception,

1.) When the emphyteusis or long lease is contracted in favour of a family, in which case only the members of the family succeed to the emphyteutical or leasehold-estate, namely, the descendants, ascendants, and collaterals, in the order of their degrees, (*juxta ordinem gradus*.)

2.) When the emphyteutical estate was granted only to the leaseholder and his children, in which case only the descendants of both sexes succeed to it.

§ 9.

Emphyteusis is completed by the consent of the two parties, without the necessity of a written contract; nevertheless this precaution would serve to facilitate the proof which must be brought, if one of the parties happen to deny all the contract, or any of its clauses or conditions.

§ 10.

One may acquire right to any emphyteusis or long lease by a testamentary settlement, or by prescription, on paying a yearly rent of an heritage to its proprietor, and possessing ten years when parties are present, and for twenty years when absent, fairly, (*bona fide*), and on a just title, or otherwise for thirty years.

§ 11.

§ 11.

An heritage is usually given on an emphyteusis for several years. Nevertheless, it may also be given on an emphyteusis for a short time: for the nature of the agreement is not thereby changed, which consists in causing the yearly rent to be paid in acknowledgment of the right of property, and not under the title of hire or recompense, which comes in place of the enjoyment of the heritage; whence it follows, that an emphyteutical lease does not become a lease for farm, because contracted only for a few years. See above, § 5.

§ 12.

It is essential to an emphyteusis, that a yearly rent be paid in acknowledgment of the right of property, (*canonem in recognitionem dominii.*) This rent may consist either in ready money, (even though it were but one fening or one groat), or in other things, in fruits, in provisions, for example, in a wispel of oats, in ten pairs of capons, &c.

§ 13.

The rent which a leaseholder is to pay can neither be raised nor lowered on any pretext whatsoever; a man cannot then demand an abatement or discharge of the rent, under pretence that the year has been bad, that the hail occasioned much loss, &c. The emphyteutical lease cannot even be broke on account of an enormous wrong, (*ob læsionem enormem.*)

§ 14.

The leaseholder is obliged to pay the rent in the place where the contract was executed.

§ 15.

The effect of an emphyteutical lease with respect to the leaseholder is,

1.) That he acquires by the emphyteusis a personal action, called *actio emphyteuticaria*, by which he may

sue the person who gave him the heritage on emphyteusis, to oblige him to deliver it agreeable to his promise to that purpose. See above, § 2.

2.) That he obtains after delivery of the heritage a real right, which is called the advantageous property, (*dominium utile*), by virtue of which he acquires the right to sue at law, to receive and enjoy the subject in the same manner as the direct superior might have done, by virtue of his right of property.

He acquires also in consequence the treasure that may be found in the leasehold-estate, (reserving the right of the person who finds it), and the imperceptible accretions which the estate receives by alluvion, (*alluvione*.) He is also considered as possessor of an immoveable subject, and in this quality is exempted from giving security.

3.) That he may, at his pleasure, alienate the leasehold-estate, on demanding the consent of the direct superior, which the latter cannot refuse unless he allege very strong reasons; for he loses nothing by the change, the successor entering into all rights and burdens of the leaseholder.

§ 16.

Among the reasons which are strong enough to authorise the direct superior to refuse his consent to the alienation of a leasehold-estate, are reckoned the following circumstances, namely, when the person who is to succeed lives in enmity with the direct superior, when he is more powerful than he; when it is a neighbour of the leasehold-estate who is seeking to appropriate it to himself; when the successor is poor and indebted; in which cases the judge ought to take cognisance of the affair.

§ 17.

When the superior has no valid reason to refuse his consent, and does not give it within the space of two,

two, or if it be a secular leasehold-estate, of three months, the leaseholder may alienate without that consent; provided the successor shall nevertheless pay the dues on alienation (*laudemium*) to the direct superior.

The direct superior has the right of preference, when he offers to fulfil the conditions offered to the leaseholder, and is in a condition to perform them immediately.

§ 18.

When the direct superior has once given his consent to the alienation, he cannot afterward retract.

§ 19.

Such an alienation made with the consent of the direct superior is valid, even to the prejudice of the leaseholder's children; for they are bound by the deed of their father, from whom they cannot inherit a leasehold-estate, but by succeeding to all his other effects; but the alienation cannot prejudice the agnats, who hold their rights by the agreements and foresight of their ancestors, (*ex pacto et providentia majorum.*)

§ 20.

The direct superior, who has consented to the alienation of a leasehold-estate, is not obliged for that reason to acknowledge, when the emphyteusis or long lease comes to end, the debts contracted upon that estate: for this consent has no other effect than to authorise the successor to enter into all the rights of the leaseholder; which would not be allowable for him to do without such consent.

The direct superior cannot then be burdened with those debts, unless he have expressly engaged, on giving his consent to the alienation, to take them upon himself, in case they were not paid.

§ 21.

§ 21.

When the leaseholder alienates the leasehold-estate without the consent of the superior, he thereby loses all his right of emphyteusis or leasehold.

§ 22.

If he raise at his own charges any building on the heritage given him in leasehold, neither can he alienate that without the consent of the direct superior; for the building belonging to the heritage on which it is raised consequently belongs also to the direct superior. See above.

§ 23.

It is reckoned as an alienation,

a) When a special hypothec or mortgage is given on the leasehold-estate, inferring an alienation of the estate in defect of payment, but not when a general hypothec or mortgage is given on all a person's effects, under which neither fiefs nor leasehold-estates are comprehended.

b) When a leasehold-estate is alienated on any condition whatsoever, (*sive resolutive sive suspensiva*), because the alienation follows if the condition happen to exist.

c) When the leaseholder yields to another his right of advantageous property, which does not take place with respect to fiefs. Moreover, it is not an alienation when the leaseholder only gives a right of servitude on the leasehold-estate, or only grants the usufruct of it to another.

§ 24.

When the leaseholder wants to alienate the leasehold-estate, he is obliged to inform the direct superior of it, and to acquaint him with the price of the sale, and the conditions on which it was made.

§ 25.

This intimation ought to be made before the delivery, either,

1.) To the direct superior himself, as it is not sufficient to make it to his general or special commissioner; or,

2.) To the person who has power to administer the direct superior's effects. If then the leasehold-estate be comprehended in the ordinary profectitious or adventitious peculiar of a son, the intimation ought to be made to the father; if the direct superior be a pupil, a minor under age, a furious or fatuous person, or a squanderer, the intimation is to be made to the guardian or curator.

If the heritage given in emphyteusis, or long lease, make part of the portion, the intimation must be made to the husband as well as to the wife, and the consent of both demanded; but if it were included in the paraphernal effects of the wife, it would be sufficient to intimate the alienation to her; and when it is a community for pious uses, it is not necessary to make the intimation to the whole community or chapter; it is sufficient if it be made to the person who is the first director of it.

When there are several direct superiors, the intimation of the sale and its conditions must be made to all; in defect of which the long lease or emphyteusis is null with respect to his portion to whom the intimation was not made.

§ 26.

The leaseholder is bound for all burdens, ordinary or extraordinary, real or personal; he is even obliged, if those who possessed the leasehold-estate before him have suffered the burdens to accumulate, to discharge them, reserving his own recourse, (*salvo regressu.*)

§ 27.

All the losses which happen with regard to the advantageous property, (*dominii utilis*), and of the fruits or incomes of the leasehold-estate, are on the risk of the leaseholder, who can, under that pretext, demand neither indemnification, delay, nor abatement of the rent.

§ 28.

The leaseholder acquires, in virtue of his right of advantageous property, a real action, called *advantageous claim of right*, by which he may redemand the leasehold-estate, with all its dependencies, (*cum omni causa*), from the possessor, whoever he be, and even from the direct superior.

If the leaseholder be disturbed in the possession of the leasehold-estate, or if he be even quite dispossessed of it, he may, in virtue of his right of advantageous property, get himself supported by all the interdicts competent to the real proprietor.

§ 29.

The effect of an emphyteusis or long lease with respect to the direct superior is, that he preserves the direct property of the leasehold-estate; whence it follows,

1.) That the leaseholder cannot alienate the leasehold-estate without the consent of the direct superior; whereas the latter can transfer to another his right of direct property, without the consent of the leaseholder.

2.) That in case of alienation, the direct superior has the right of preference on the leasehold-estate, on offering to fulfil the same conditions on which the leaseholder wants to alienate it, unless the latter transfer his right merely for gain, (*titulo mere lucrativo.*)

Observe, that the direct superior does not renounce his right of preference by giving his consent to the constitution of a hypothec or mortgage.

3.) That

3.) That the leaseholder is obliged to pay to the direct superior a yearly rent, (*canonem*); and if he fail in so doing, he is deprived after a certain time of his right of emphyteusis or leasehold. See the following section.

4.) That at every change of a leaseholder, and not of a direct superior, every successor to the leasehold-estate is bound to renew the emphyteusis or lease, and to pay to the direct superior the duty of entry, (*laudemium*), which ought to be determined according to the custom of the country, when there is nothing settled with respect to it in the emphyteutical lease. In a dubious case this duty is the fiftieth part of the value of the estate.

5.) That when the leasehold-fortune happens to perish, the direct superior loses his right of direct property; for a thing which perishes is lost to its owner, (*res enim perit domino.*)

6.) That the direct superior has several actions with regard to the leasehold-fortune, namely,

a) The action called *emphyteuticaria* against the leaseholder, to oblige him to discharge the yearly rent, which he bound himself to pay.

b) A claim of right, when the emphyteusis or long lease comes to an end. See the following section.

§ 30.

An emphyteusis or long lease comes to an end,

1.) When the leaseholder renounces his right, when he resigns it in the hands of the direct superior, and when the latter accepts of the renunciation.

2.) When the time for which the emphyteutic lease was contracted is elapsed, and consequently the advantageous property (*dominium utile*) is reunited to the direct property, (*cum dominio directo*); for example,

a) When the emphyteutic lease is made for a certain number of years, and they are elapsed.

b) When not being confined to a certain number of years, the leaseholder happens to die, without leaving an heir. See above, § 8.

c) When the lease is restrained or limited to a family, and it comes to be extinguished.

d) When the lease is extended to the children of the leaseholder, but he leaves neither son nor daughter.

e) When the lease grants the right of emphyteusis only to the males, and they are all dead. See § 8.

3.) Emphyteusis comes to an end, in the third place, when the leasehold-estate happens to perish, and consequently ceases to exist; which happens also when the figure or form of the estate is changed. See above, book II. tit. V. art. II. § 10.

But in case the fortune were not entirely destroyed, and there remained still a part of it, the emphyteusis or long lease would subsist with respect to that part.

4.) Emphyteusis comes to an end, in the fourth place, when the leaseholder, (*dominus utilis*), and the direct superior, (*dominus directus*), succeed each other mutually, and their effects are thereby mixed.

5.) Emphyteusis comes to an end, in the fifth place, when the leasehold-estate happens to be confiscated on account of a crime committed by the leaseholder; in which case, nevertheless, it does not fall to the treasury, but returns to the direct superior.

6.) Emphyteusis comes to an end, in the sixth place, when the enemy seizes on the leasehold-estate: but in case the estate happen afterward to be abandoned by the enemy, it shall be restored to the leaseholder, by virtue of the right of return or reversion, (*jure postliminii*.) See book II. tit. V. art. VI. § 34.

7.) Emphyteusis comes to an end, in the seventh place, by prescription, when the direct superior, having resumed the possession of the leasehold-estate, refuses it to the leaseholder, who demands it from him, and the leaseholder afterward acquiesces in the direct superior's

superior's possession, and kept silence for ten years, both parties being present, and twenty years when absent; the leasehold-fortune thereby ceases to be subject to the right of emphyteusis or leaseholding, and remains with the direct superior free from that burden. See below, tit. V. § 26.

It is the same with respect to the yearly rent, if the leaseholder refusing to pay it, the direct superior acquiesce in that refusal during the years just mentioned; in which case the leaseholder acquires the real property of the leasehold-estate, and consequently the emphyteusis and advantageous property come to end by prescription. See the said twenty-sixth section.

8.) An emphyteusis may be revoked, in the eighth place, if the leaseholder damnify the subject considerably; for example, if he destroy the forest, if he pluck up the fruit-trees of the garden, if he do not repair the house, &c.

Nevertheless, that the damage or neglect of the subject may cause the emphyteusis to be annulled, a) It must occasion a perpetual prejudice to the subject, as happens when a forest is destroyed, either in whole or in part: and, b) It must be done fraudulently, or in consequence of an enormous fault, (*dolo vel lata culpa*), for a slight fault (*levis culpa*) would not be sufficient for that purpose.

If the two conditions requisite for causing an emphyteusis to be annulled do not exist, or if the leaseholder offer of himself to repair the damage immediately, and set about doing it, the direct superior cannot sue him at law, excepting for his damage and interest.

9.) Emphyteusis comes to an end, in the ninth place, if the leaseholder do not pay his yearly rent within the space of two years when it is an ecclesiastical fortune, and of three years when it is a secular heritage: for he thereby loses by law (*ipso jure*) his em-

phyteusis or long lease, without the necessity of a summons or judicial proceedings.

There are nevertheless several cases in which the leaseholder does not lose his right for not paying the yearly rent, and which are so many exceptions to the rule just established ; namely,

a) When the leaseholder offers and presents the payment of the rent, with arrears and interest, before the direct superior have raised his claim of right, or demanded in court to have the leaseholder ejected out of the leasehold-estate ; or,

b) When the superior has expressly declared that he will not avail himself of the leaseholder's delay in payment of the rent.

c) When the emphyteutic lease contains a particular clause with respect to the payment of the rent, and a certain penalty has been stipulated by the contract against the leaseholder if he neglect to pay it.

d) When the leaseholder is in arrear of paying his rent only during the continuance of the process with the direct superior, on pretence that the subject is become frail ; or,

e) When there are several superiors disputing for the direct property of the heritage ; in which case, nevertheless, the leaseholder is bound, at the requisition of one of them, to deposit all the rent in court ; or,

f) When the superior has accepted of part of the rent, though it were even under protest, that he does not design to prejudice his right of redemanding the leasehold-fortune ; or,

g) When the superior pretending that the subject is become decayed, and having raised on this account his action against the leaseholder, nevertheless accepts of the rent from him, even though it were under the protest just mentioned.

h) When the rent of a leasehold-estate in the possession

feſſion of the treaſury, or belonging to any community for pious uſes, is neglected to be paid; becauſe in ſuch caſes all the fault is on the ſide of the tenant who adminiſters thoſe ſubjects, and for this reaſon the direct ſuperiors cannot be allowed to get them declared decayed, but ſolely to ſue for payment of the rent.

i) When the leaſeholder is abſent on the ſervice of the ſtate, (*reipublicæ cauſa*); or,

k) When he has been prohibited by the judge to pay the rent; or,

l) When he has advanced it to the direct ſuperior; or,

m) When he is kept in priſon, even though it were by his own fault; or,

n) When, for not paying of the rent, he had beſides ſome reaſon, which the judge, whom we authoriſe to determine on its validity, ſhall find relevant. Obſerve, that, when there are ſeveral leaſeholders, and one of them only deficient in paying his rent, the direct ſuperior cannot claim the ſhare of the heritage belonging to the perſon in arrears, but is to ſue for payment of the rent by way of execution.

Obſerve alſo, that the leaſeholder cannot be excuſed from payment of the rent, on pretence of compensation, even though the direct ſuperior were his debtor, on ſome other account (*ex alio capite*), becauſe the recogniſance of the direct property (*recognitio domini directi*) is not one of thoſe things which can be compensated with other debts which do not come in place of it.

10.) Emphyteuſis comes to an end, in the tenth place, when the leaſeholder boldly and maliciously denies that the ſubject which he poſſeſſes was given in emphyteuſis or leaſeholding.

11.) Emphyteuſis comes to an end, in the eleventh place, when the leaſeholder alienates it without
the

the consent of the direct superior. This would take place,

a) Even though the price of the sale were not paid, and though the leaseholder had reserved to himself the property of the subject, till complete payment; or,

b) Even though, in the sale, it should be stipulated, that the consent of the direct superior should be previously required, if it be not in fact required for the three following months; or,

c) Even though the alienation should be made only under a condition, whatever it be, by reason that it is a real alienation, if the condition happen to exist; or,

d) Even though the alienation should be for the direct superior's advantage.

Note, That if we, or a community for pious uses, should alienate a leasehold-fortune, without the consent of the direct superior, the subject would not become decayed; but the alienation would be null, and the new possessor would immediately be put out of the subject.

12.) Emphyteusis comes to an end, in the twelfth place, when the leaseholder in fact requires the consent of the direct superior, but does not declare, at the same time, the price offered to him, and the conditions on which he has agreed; or,

13.) When he declares a higher price than that offered, or conditions harder than those on which he has agreed; or,

14.) When he declares a less price than that agreed, in order to hurt the duty of entry, (*laudemio*.)

Note, That, in these three last cases, the direct superior is at liberty to refer to the oath either of the buyer or of the defender the circumstances which may happen in the sale.

§ 32.

When the leasehold-estate returns to the direct superior, it is just that in all the cases mentioned in the preceeding section, the leaseholder should have it in his power to demand reimbursement of the necessary expenses which he shall prove to have laid out for the subject. They have been treated of above, book II. tit. IV. art. I.

§ 33.

Though the right of emphyteusis, or leaseholding, be extinguished, and come to an end, by all the methods just mentioned, the direct superior nevertheless is not at liberty to dispossess the leaseholder by his own proper authority, even though that power had been reserved to him in the emphyteutical lease, but he is to apply for that purpose to the judge.

If he should take upon him to dispossess them, without the assistance of the judge, he would lose the right which he had to redemand the leasehold-estate, and the leaseholder would continue to enjoy it as before, after being re-established in his possession, and obtaining all the damages and interest due to him for being dispossessed, (*ex capite spolii.*)

§ 34.

When the leasehold-estate returns to the superior, he is not bound to pay the debts contracted on that estate by the leaseholder, even though he may have given his consent to the alienation made of it by another. See above, § 20.

T I T L E IV.

Of the method of acquiring civil property (dominium civile), by raising an edifice on a surface, or by making any other use of the surface.

(De superficie.)

§ 1.

When the proprietor of a piece of ground allows another to build upon it, for several years, or for ever, a house, a stable, a barn, or a shop, &c.; or when he grants a permission to lay upon it, and to keep there stones, wood, merchandise, &c. or to use a house which is raised upon it already, this permission is called a right of surface (*superficies*), because thereby the proprietor does not transfer to the other the ground itself (*solum*), but only the surface, (*faciem terræ*), and a distinction is made between the ground and the surface.

§ 2.

To be able to constitute such a right of surface, it is requisite,

1.) That the person who grants it be proprietor of the ground on which it is assigned, and have the liberty to dispose of it;

2.) That he deliver to him the place, because neither a right of property, nor any other real right, can be acquired without possession. Whence it follows, that a person to whom the right of surface was only promised, without being followed by delivery, has only a personal action against the proprietor of the ground, to oblige him to give him the right of surface.

3.) That

3.) That the right of surface be transferred by virtue of a valid title. For example, by virtue of a donation, of a testamentary settlement, of a prescription, of a lease for several years.

4.) That he to whom this right of surface has been granted, and who is called *superficiarius*, maintain the place, and pay on its account a ground-rent, (*solarium*.)

§ 3.

According to the law of nature, the right of surface on another's ground operates only a personal obligation, in virtue of which the person called *superficiarius*, may, in case he be disturbed in the use of the surface, sue the proprietor of the ground to support him against those who disturb him, or else to yield to him the right of suing at law.

But as it would be very chargeable for a man who has a right of surface to take such a course, and to be obliged, for the support of his right, to apply to the proprietor of the ground, or his heirs, who may be much dispersed, the laws have allowed him a real right, and have declared him advantageous proprietor of the ground, (*pro domino utili*.)

§ 4.

The effect of a real right with respect to a man to whom the right of surface is due (*quoad superficiarium*), is,

I.) That he acquires a kind of property, which is called advantageous property, (*dominium utile*), and that he possesses the surface naturally, (*naturaliter*); that is to say, in his own name, and not civilly, (*civiliter*), that is, in name of another. Wherefore, also he may take the same advantage of the surface, by virtue of his advantageous property, as the proprietor is entitled to do by the direct property. He may consequently, at his pleasure, dispose of the surface, sell it, pledge or mortgage it, and subject it to a ser-

vitute, but only for the time that the right of surface continues. As one who has this right cannot extend it to the ground itself, he cannot plant trees, form a vineyard, &c. upon it, because these are profits taken out of the ground itself, and not out of the surface: moreover, he is bound to maintain, at his own charges, the surface and habitation, and to restore them when his right comes to an end, in the same state that he received them.

He bears also all the burdens due for the surface, or for the buildings raised on it, as well as those imposed on the possessor for that surface, whether ordinary or extraordinary, real or personal.

II.) A man who has the right of surface (*superficiarius*) acquires, in the second place, by virtue of his advantageous property, a real action, namely, an advantageous claim of right, by which he may, when he has lost the possession of the surface, sue any possessor, even the proprietor of the ground, and redemand the surface with all its dependencies, (*cum omni causa*.)

He gets even, in certain cases, by virtue of his advantageous property, other actions which the proprietor of the ground has by virtue of his right of direct property; namely, the actions called *familiæ eriscundæ*, *communi dividundo*, *Publiciana in rem*, and that which is called *confessoria*, when a servitude is due to the surface, &c. If force were employed to dispossess him, he would have the action *de vi et vi armata*, &c.

If the question be not about redemanding one's right itself, but only to be supported in the possession of the surface, a man is allowed the interdicts *de superficiebus*, of which we shall treat afterward.

§ 5.

The effect of a real right, with respect to the direct superior (*domini directi*), who granted the right of surface, is,

1.) That

I.) That the superior preserves his right of direct property on the surface; and consequently the buildings raised on the ground by one who has a right to the surface, belong to the superior of the ground, (*jure soli.*)

II.) That a man who has a right to the surface does not possess the ground in his own name, and consequently he possesses it in name of the direct superior.

III.) That the superior may redemand the subject from any possessor whatever, when the right of surface is ended.

IV.) That he may demand the ground-rent in a personal action.

§ 6.

When a man who has a right to the surface has mortgaged the subject, and a competition arising, the creditor competes with the proprietor of the ground for the ground-rent, this last has the preference of the creditor, if the mortgage were not inserted in the register of mortgages.

§ 7.

If a man who has a right to the surface be in arrear in paying his ground-rent, he does not thereby lose his right, and the proprietor of the ground has only a personal action against him, by which he can oblige him to pay the rent; in which a right of surface differs from an emphyteusis, or leaseholding.

§ 8.

It is easy to judge, by what has been said, in what a right of surface differs from the other rights with which it has some resemblance. For example,

1.) It differs from usufruct and use in this, that the usufructuary and user may enjoy all the kinds of fruits and uses which can be drawn from the ground; and,

2.) From inhabitation, in this, that a man who has

the right of surface enjoys the house by virtue of his right of property, (*jure domini*.)

3.) The right of surface differs from servitude in this, that a man who has the right of surface has the advantageous property of it (*dominium utile*), and that the right which one has on his own subject, (*in re propria*), is not called a servitude. Besides, to establish a right of servitude on a subject, there must be a neighbouring subject, in favour of which this right is established, which is not requisite in the establishment of a right of surface.

4.) A right of surface differs also from an emphyteusis or leaseholding in this, that the leaseholder
a) Has a right to enjoy all the fruits and incomes of the ground; b) Under condition of meliorating it, and paying a yearly rent for it; c) In acknowledgment of the direct superior's right of property.

5.) A right of surface differs, in fine, from renting (*a locazione*) in this, that a person who obtains, by renting, the use of a place for a short space, acquires only a personal obligation, and not a real right; and that consequently the taker or hirer has only a personal action against the setter, and has no action against the third party.

But if the word *surface* were expressed in the contract, it would not be a location, or setting for rent, even though the right of surface were given only for a few years.

§ 9.

This right of surface, and the advantageous property (*dominium utile*) thence resulting, cease,

1.) When the surface happens to perish: for example, when, being an edifice, it is so destroyed that no part of it remains; and, in this case, the right of surface would not revive, even though a new edifice were built upon it.

2.) When the advantageous property is confounded

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ed with the direct property, as happens when the proprietor of the ground, and the person who has the right of surface, become heirs of one another, or when one of them acquires the right from the other by prescription.

3.) When the right of surface is granted only for a certain time, and that time is expired; but,

4.) The right of surface does not come to an end by delay of payment of the ground-rent.

T I T L E V.

Of the way of acquiring civil property by prescription.

(De usucapione et præscriptione.)

§ 1.

BY the law of nature neither the long possession of a thing belonging to another, nor the exercise of a right on another's ground for a long space of time, is a lawful method of acquiring the property of a thing, or any other right upon another person's ground, and of depriving the proprietor of his right. It may be asserted, on the contrary, that, according to the law of nature, the injustice done to a man in retaining subjects belonging to him, or by assuming unjustly any right upon these subjects, seems to be increased always more and more in proportion as we possess longer what we have not lawfully acquired.

§ 2.

But as it is the public interest that such as for a long course of years possess a thing belonging to another, or exercise a right on another's subject, be at last freed from disquiet, it is not without reason that the laws have determined a certain time, after which
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those who are in possession of a thing, or of the exercise of a right upon another's subject, cannot be prosecuted nor disturbed on that head. This is what is called prescription.

§ 3.

The Roman and Canon laws have so confounded the subject of prescription, that far from contributing by prescription to the quiet and security of private persons, they have occasioned a multitude of law-suits and discussions.

§ 4.

For this reason we thought it necessary to lay down stated and certain principles on this subject, in other respects so interesting, and to remove the doubts raised on this head. With this view we have preserved only three kinds of prescriptions; namely,

- 1.) That which is called in the Roman laws *usucapion*.
- 2.) The prescription of thirty or forty years.
- 3.) The prescription which takes place by possession for time immemorial.

A R T. I.

Of the prescription called in law usucapion.

§ 5.

USucapion is a method of acquiring the property of a thing belonging to another, or a right on the fortune or subject of another, (*jus alienum*.) It is also a method of being freed from a burden on our own subject.

§ 6.

To acquire by way of usucapion, it is requisite,

- 1.) That a person who gets by prescription be capable of possessing the thing, or a right.
- 2.) That

2.) That the thing and the right belong to another; and,

3.) That the person who gets it by prescription possess,

4.) Fairly, (*bona fide*); and,

5.) By virtue of a just title, (*ex justo titulo*.)

§ 7.

I. It is then requisite, in the first place, that a person who gets by prescription in the way of usucapion, be capable of taking possession of the thing, and of acquiring it. Whence it follows,

a) That a pupil who is near to puberty (*pubertati proximus*) may, without the assistance of his guardian, take possession of a subject, and begin to run the prescription.

b) That, on the contrary, a pupil who is still in infancy, or who is just come out of it, (*infantia proximus*), cannot run the prescription, even though his guardian should interpose his authority; and that it belongs consequently to the guardian alone to begin the usucapion in his pupil's name.

c) That a furious or fatuous person likewise cannot begin the usucapion, even with his curator's consent, and that it belongs to the curator only to begin to run the prescription in name of his ward; but if the furious or fatuous person have begun to possess while he was still in his senses, he may continue the usucapion, and finish the prescription.

d) That sons of families may also acquire by prescription, in way of usucapion or possession, subjects which belong to the camp, and supposed camp peculiars, or to the adventitious peculiar, ordinary and extraordinary, (*ad peculium adventitium, ordinarium et extraordinarium*.) But as to subjects belonging to the profectitious peculiar, (*ad peculium profectitium*), they can be acquired by prescription only in their father's name.

And

And with regard to those of the ordinary adventitious peculiar, (*quoad peculium adventitium ordinarium*), the sons of families may indeed acquire it by prescription, but the father acquires the usufruct of it.

In fine, e) That all such as cannot acquire the property of a subject, neither can they get it by prescription. Such are, for example, those who have been outlawed.

N. 1. Heirs and singular successors are allowed to continue the usucapion or possession begun by the defunct, provided that both be in possession fairly, (*bona fide*), as well as the defunct.

For if the defunct had possessed the subject unfairly, (*mala fide*), neither his heirs nor singular successors could continue it, even though they were themselves in possession fairly, (*bona fide*): they must then begin it in their own name; whence it follows, that usucapion could not begin in favour of heirs till after their entry on the inheritance, and, with respect to particular successors, after the delivery of the subject.

N. 2. A man may also acquire by prescription by another; for example, a father by his son, even without the father's knowledge, when the son takes possession of the subject in his father's name; which likewise takes place in the profectitious peculiar. One may also begin usucapion by an attorney or procurator; but the person who has settled the attorney or procurator, must know of his doing so.

§ 8.

II.) It is requisite, in the second place, that the subject in which the property is acquired by prescription, or on which a right of usucapion is appropriated, belong to another: for no body can get what is his own; nor impose upon himself a burden by prescription.

§ 9.

III.) It is requisite, in the third place, that a person
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who gets by prescription be fairly and *bona fide* in possession of the subject or right; that is to say, that he have always believed that the subject belongs to him, or that he was well founded in assuming a right to the subject or estate of his neighbour.

A person who gets by prescription then does it with presumptive dishonesty, *mala fide*, if knowing certainly that he has no right, he appropriate to himself the subject or a right in his neighbour's fortune. It is likewise with presumptive dishonesty (*mala fide*) if he make an acquisition of it from a person whom he knows to have no right, or if he only doubt that person's having any right in the thing, when the doubt is accompanied with certain circumstances; as if he were acquainted that the person from whom he got the subject had already been called to account, and prosecuted on its account.

But if there were none of these particular circumstances to make him doubt of his rights, and his doubt were without foundation, for example, if a town-talk were spread that the person from whom he had the subject was not its proprietor, he would not cease thereby to act fairly. The proprietor however would be at liberty to take his oath on this fact, namely, whether at the time that this report was current, or afterward, he had not in fact an entire certainty, that the subject did not belong to his author.

Neither would he act fairly if by a mistake of right he had believed; for example, that his author who was only usufructuary of the subject had the power to alienate the property of it.

Moreover, presumptive honesty, *bona fides*, is not only requisite at the time the possession is acquired, but also during the whole time that the usucapion lasts; the reason of this is, that when a man acts with presumptive dishonesty, *mala fide*, he cannot acquire a subject by so short a possession.

But as fair dealing is always presumed in a person who gets by prescription, one who pretends that another has possessed unfairly, (*mala fide*), must prove it.

§ 10.

IV.) It is requisite, in the fourth place, that a person who acquires by prescription have obtained the subject or right by a just title or deed, (*ex justo titulo*); that is to say, by a deed fit to transfer property, or any other real right, (*ex causa dominii seu juris translativa*.)

N. 1. It is not sufficient then, that he be persuaded he has a just title, and that he believe that his author possessed it in virtue of such a title, unless he have good reasons for so believing; as for example,

a) If he found the subject or right among the things belonging to the succession of the person whose heir he is; for he is not obliged to know whether the defunct had acquired the subject by virtue of a just title.

Or, b) If having intrusted another to purchase the subject, it be delivered to him by his trustee, though afterward the bargain be declared null.

Or, c) If buying a thing from a furious or fatuous person, he believed he was contracting with a man in his senses.

Or, d) If he receive money which is not due.

Or, e) If he accept fairly (*bona fide*) of a legacy left him in a will, not knowing that this legacy was revoked by a codicil, &c.

N. 2. When a man possesses a thing by virtue of a pretended agreement, the title is null, and consequently the usucapion ineffectual. If then one acknowledge in a contract that he has sold his house, to Caius, though he have only set it to him, Caius could not pretend to have got it by prescription, though he had possessed it for the time necessary to prescription;

prescription; the reason of which is, that he has not possessed it by virtue of a just title that can convey the property, (*ex justo titulo dominii translativo.*)

§ 11.

We have indeed laid down this general principle, that all causes or titles fit to transfer property ought to be regarded as just titles to operate usucapion: nevertheless, as there are some of those titles accompanied with particular circumstances, it is proper particularly to explain them,

§ 12.

One of those titles is, in the first place, what is called *pro soluto*, which takes place, for example, when Caius honestly (*bona fide*) believes that Seius owes him one hundred crowns, and Seius pays them to him by mistake. In this case Caius gets those hundred crowns by prescription, by virtue of the title *pro soluto*. This title likewise takes place when Seius delivers a thing to Caius, and Caius honestly (*bona fide*) believes that it belongs to Seius, in which case usucapion has also its effect in virtue of the title *pro soluto*.

§ 13.

2.) Another title accompanied with particular circumstances is that called *pro emptore*, which takes place when Caius buys from Seius a thing which does not belong to Seius.

That usucapion may have its effect in this case, it is requisite, 1.) That Seius be really capable of entering into an agreement. 2.) That the sale have been really concluded, as it is not sufficient that Caius believed he had bought the thing. 3.) That delivery have followed, even though it should have been but a fictitious delivery, (*per fictam traditionem.*) 4.) That Caius have acted honestly, (*bona fide*); and, 5.) That

the price of the purchase have been effectually paid to Seius, or that he have lent it to Caius, or that Caius have satisfied Seius in some other way.

A man is also reckoned purchaser as to the effect of usucapion, (*quoad effectum usucapionis*), when he has honestly (*bona fide*) paid the estimation of his neighbour's suit, (*æstimationem litis alienæ bona fide*), or when one has obtained by transaction, by exchange, or by division, (*ex causa transactionis, permutationis, vel divisionis*), a thing belonging to another and fairly delivered, (*rem alienam bona fide traditam*.)

Neither does the buyer cease to have acted fairly, because he knew beforehand that the seller would squander the produce of this sale to satisfy his inclination to debauchery: for it is sufficient if he believed that the seller had the property of the thing.

But it would not be regarded as a title *pro emptore*, if Seius had sold the thing to Caius only on condition that he would leave the sale in suspense, (*sub conditione suspensiva*), because the buyer does not acquire the property of the thing till the condition come to exist, and because for that reason usucapion cannot begin till after that time.

§ 14.

3.) A title accompanied with particular circumstances is, in the third place, the title *pro herede*, which takes place, when the true heir, or real heir, and even the person who is called in law *suus et necessarius*, finds among the effects of the succession a thing which makes no part of them, and which he possesses nevertheless as honestly, (*bona fide*), believing it belongs to himself: for it is not requisite that an heir should know by what right the defunct acquired all the subjects which compose his succession.

But if the proprietor prove that the thing was borrowed by the defunct, or that he received it only as a deposit, or, in fine, that he possessed it not in his
own

own name, but in name of the proprietor who rede-
mands it, the heir cannot run the prescription by and
in virtue of the defunct's right, (*ex jure defuncti*); he
cannot then begin the usucapion till the time of his
entry on the inheritance, that is to say, after he begun
himself fairly (*bona fide*) to possess the thing.

§ 15.

4.) A title accompanied with particular circum-
stances is, in the fourth place, the title *pro donato*,
which takes place when Seius, without having the
property of a thing, nevertheless makes a present of
it to Caius, and the donation is not contrary to the
laws.

This title is sufficient to enable one to run the pre-
scription (*quoad effectum usucapiendi*), even though the
donator should revoke the donation, and should, to
that effect, raise an action, by reason that the time re-
quisite for usucapion would nevertheless continue to
run against the proprietor.

§ 16.

5.) A title accompanied with particular circumstan-
ces is, in the fifth place, the title *pro derelicto*, which
takes place when, without having the property of a
thing, a man nevertheless abandons it, as if he were
the owner, declaring that he intends it no longer to
be included in his inheritance. In this case, he who
fairly (*bona fide*) takes possession of it, reckoning that
the person who has abandoned it was its real proprie-
tor, and had a right to quit it, may acquire it by pre-
scription, by virtue of the title *pro derelicto*.

We have moreover already explained above, book I.
tit. II. art. VI. § 51. when a thing may be reckoned
as abandoned.

§ 17.

6.) A title accompanied with particular circum-
stances is, in the sixth place, the title *pro legato*, which
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takes place when Seius, without having the property of a thing, nevertheless leaves it in legacy to Caius. In this case, Caius may acquire it by prescription, by virtue of the title *pro legato*, even though the true proprietor were still alive.

This title likewise takes place when the testator, having left in legacy to Caius a thing which belongs to him, afterward takes it from him, and Caius, not knowing that circumstance, seizes it without violence, and in a manner neither clandestine nor precarious (*sine vi, non clam, non precario.*)

Item, When the testator has left a legacy to Caius, and there are two persons of that name; in which case he of the two who possesses the thing left in legacy fairly, (*bona fide*), gets it by prescription, in virtue of the title *pro legato*; even though he were not the person to whom the legacy was destined by the testator.

This title would further be sufficient for running the prescription, even though the will in which the legacy was left were annulled on account of a defect in solemnities.

Moreover, it is well known that a man cannot run the prescription in virtue of this title, in case he be incapable of receiving any thing by will.

§ 18.

7.) A title accompanied with particular circumstances is, in the seventh place, the title *pro dote*, which takes place when a wife settles, as a portion, a thing belonging to another, in which case usucapion begins from the date of the delivery to the husband.

This title, and consequently usucapion, having no effect till after the day of the nuptials, does not then take place, when it is a bride who gives to her bridegroom a thing belonging to another, with an intent that he shall not acquire it till after the marriage; which

which is always presumed when there is any doubt on that head.

But if, without having that intention, she give purely and simply a thing to her bridegroom, usufruct would begin from the day of the delivery.

This also takes place with respect to every thing settled as a portion, whether particular, universal, or common.

A distinction must nevertheless be made, whether the portion being given before marriage, that was done by estimation or without estimation. In the first case, the husband cannot acquire the thing by prescription, neither in virtue of the title *pro dote*, nor in virtue of that which is called *pro suo*. In the second case, he runs the prescription of the thing before marriage, in virtue of the title *pro suo*, and after marriage in virtue of the title *pro dote*.

The title *pro dote* comes to an end with respect to the husband, when the marriage is dissolved or declared null; but the wife may continue to run the prescription of her own portion, of which she was put in possession by the dissolution of the marriage.

§ 19.

8.) A title accompanied with particular circumstances, and proper to operate usufruct, is, in fine, the title *pro suo*. Observe that this title may be taken in a general meaning, in which case it comes in competition with all the preceding titles, or else in a particular meaning.

If then a man run the prescription by virtue of the titles *pro emptore*, *pro legato*, *pro dote*, &c. he does it also by virtue of the title *pro suo*, in which all these particular titles are included.

The title *pro suo*, taken in a particular sense, has place when the title of the person who runs the prescription has no name peculiar to it; for example,

a) When

a) When a man finds on his grounds a wild beast which has been tamed by another, and shuts it up in his park.

b) When one has fairly (*bona fide*) enjoyed the fruits of a subject belonging to another, and has thereby been enriched.

c) When, by mistake, a thing has been paid which was not due to us, and we have accepted and received it as honestly believing it to be our own.

d) When a bride gives and delivers to her bridegroom, before the nuptials, a thing belonging to another, and without estimating it. See the preceding section.

§ 20.

V.) In order to run the prescription of a thing by usucapion, is requisite, in the fifth place, that one possess it. And indeed there is no place for usucapion, if there be not a real possession, and every possessor can only run the prescription of what he possesses, and so far as he possesses it. If then one possess a thing composed of several parts; for example, a house, he may indeed get the house by prescription, but not the materials of which the house is composed. Wherefore also the proprietor of the materials may redemand them, when the house comes to be taken down and destroyed. See above, book II, tit. V. art. IV. § 18. and 19.

The same is the case when a man possesses a whole, consisting of several parts only contingently, (*contingenter*); for example, a flock of sheep. In this case the prescription takes place with respect to the whole flock, but not with respect to every sheep in particular. Wherefore also, if there be in the flock a stray sheep, it may be redemanded by its proprietor, even after elapsing of the time requisite for usucapion.

On the other side, if a man have possessed and acquired by prescription all the materials of a ruinous house,

or

or several sheep, which he has got by prescription, each in particular, and not as forming a flock, it cannot be said in such cases that he has got the house or flock by prescription.

§ 21.

VI.) In order to be enabled to acquire by prescription in the way of usucapion, it is requisite, in the sixth place, that one possess a thing for a certain time.

The Roman laws have required a possession of three years for moveable things, and for immoveables a ten years possession when the proprietor is in the country, and twenty years when out of it.

But as it would be unjust and pernicious to society, that one who has acquired a moveable thing fairly in trade, into which men enter every day with one another, should be obliged to wait three whole years, before he be fully assured of having the property of his purchase, we have limited the time of prescription in things moveable to one year; willing, consequently, that when one has possessed a thing belonging to another for one year, the right of the first proprietor be extinguished, and that he may have his recourse only against the person who has deprived him of the possession of the thing.

Observe, that, to calculate this year, one must reckon naturally from the instant at which it began to that at which it ended, (*de momento in momentum.*)

Things immoveable fall under prescription by a possession of ten years between parties present, and of twenty between the absent.

But, in this case, the time is not reckoned *naturally*, from one instant to another, (*naturaliter de momento in momentum*), but *civilly*, from one day to another, (*civiliter de die in diem*). Whence it follows, that usucapion is accomplished when the last day is come. A proprietor, moreover, is reckoned present, while

he remains in the province where he has his residence; and absent, when he is out of that province.

§ 22.

VII.) To acquire by prescription in the way of usucapion, it is, in fine, requisite, that the person who runs this prescription be not interrupted in the possession.

Interruption is made either naturally, *naturaliter*, or civilly, *civiliter*.

Possession is interrupted naturally, when the possessor is dispossessed, or loses the possession in any other way. It will be seen, in the third part, when, and in what manner, one is reckoned to have lost the possession of a thing.

Possession is then interrupted naturally, when the possessor loses by theft, or robbery, the thing which he possessed, or when he is dispossessed of it in a violent manner, and by open force; but not when one seizes it secretly, and in a surreptitious manner.

Possession is also interrupted naturally, if, while the prescription is running, the thing be put out of the commerce of mankind; for example, if it happen to be consecrated to divine service, &c.

Possession is interrupted civilly by the interpellation of the proprietor, namely, when he interpellates or challenges, and judicially summons the possessor of the thing to restore it to him, if he obtain a decree of citation against him, and cause it to be notified.

It is not moreover necessary to interrupt usucapion, that the cause be litigated.

But an interpellation made extrajudicially would not be sufficient to interrupt usucapion, unless it were made to the possessor by a notary attended by witnesses, to acquaint him, that claims are laid to the thing which he possesses, by which he becomes the
unfair

unfair (*mala fide*) possessor; wherefore also he will do prudently, if, in order to maintain his rights, he sue the pretended proprietor on the law against defamation (*ex lege diffamari.*)

If the possessor finish the time requisite for usucapion, during the litigation of the cause, or duration of the process, that is no advantage to him; so that if, by the sentence passed, the demandant's right of property be acknowledged, the possessor cannot object usucapion, because it has, once been interrupted by interpellation.

If the proprietor nevertheless do not raise his action within a year and day after the extrajudicial interpellation, or if, within that space, he do not prosecute the action which he has raised, the possession shall not be interrupted by the interpellation, and the possessor shall continue the course of prescription, as if no such interpellation had been made.

In case severals have a right to the thing, and the interpellation be made only by some of them, or when all having interpellated the possessor, some of them afterward renounce the cause, or give it up, the possessor continues his right to run the prescription, against the share of such as have not interpellated him, or who have renounced the cause, by reason that usucapion has not been interrupted with respect to them.

Possession is not interrupted when a thing passes to heirs or to particular successors, if they be both in *bona fide* possession, by reason that they are reckoned to continue the fair possession of their predecessors.

§ 23.

It is evident, moreover, that usucapion has its effect only when the proprietor might have objected to it.

Consequently usucapion cannot be alleged against a person who has had good reasons to absent; that is

to say, to go out of the province in which he has had his residence. The time requisite for usucapion cannot then begin to run against him till after the day of his return.

Neither does usucapion take place, when the proprietor could not sue the possessor on account of a war, of a pestilence, of his own minority, of a mistaken right, or of such other lawful impediment.

It is also regarded as a valid reason, not to sue,

a) When a son, out of respect to his father, to whom he has not entered heir, has not demanded from him, when he was yet alive, his mother's fortune, which the father has squandered.

b) When a wife, out of regard to her husband, does not redemand from him the dotal fortune which he has alienated.

c) When the possessor's interest and authority ties up the proprietor's hands, and hinders him from prosecuting his right.

§ 24.

Prescription runs in way of usucapion chiefly in all things corporeal, be they moveable or immoveable; but from this rule are excepted,

1.) Things stolen, which cannot be got by prescription, but by a possession of thirty years, even though they were in the hands of a *bona fide* possessor.

2.) It is the same in things which a wife has conveyed away of her husband's fortune; likewise,

3.) In those conveyed away out of a succession; and,

4.) Of effects seized by violence, and open force, against which likewise prescription cannot run in the way of usucapion.

Observe that, if these things cease to be imperfect, and the defect which may be in them be corrected; that is to say, if they be restored and returned to their first state, or if the proprietor have been satisfied in
any

any other way with regard to them, they may be acquired by prescription in the way of usucapion.

These things, nevertheless, do not cease to be imperfect, when they are returned into the proprietor's possession by virtue of another cause or title, (*ex alia causa.*)

It is not necessary, moreover, that restitution be made to the proprietor himself; but it is sufficient, for example, that it be restored to the person to whom he had lent it, or with whom he had deposited it. It may also be returned to a guardian or curator; but if it be the guardian or curator who conveyed it away, he must restore it to his pupil or minor himself.

5.) A judge cannot acquire, by way of usucapion, the presents made to him, though he had even received them only to do and accelerate justice.

6.) Neither does usucapion take place with respect to things which belong to us or to our exchequer, nor with respect to such as belong to pupils, to cities, to pious uses, and to all such as enjoy the rights of minors; because, in such cases, the neglect of redemanding ought not to be imputed to the proprietors, but to such as are intrusted with the administration of their effects.

7.) Neither does usucapion take place with respect to vacant subjects, whether the exchequer has been informed of them or not; for those subjects belong to our royalties, and consequently such as are in possession of them are always reckoned to possess them unfairly, *mala fide.*

8.) Neither can the things be acquired by prescription, the alienation of which is prohibited by any settlement approved by the laws; such is, for example, a feoffment in trust.

9.) Nor things prohibited by the laws themselves to be alienated; for example, the dotal fortune.

10.) As to things belonging to the adventitious peculiar,

peculiar, and which a father alienates, usucapion does not take place while he lives, &c. by reason that he has the usufruct of this peculiar: usucapion then does not begin to run till after the day on which a son was what is called in law *sui juris*; that is to say, after he ceased to be under the paternal power.

11.) Neither can things be got by prescription which of their own nature cannot be possessed by man; such are things common.

12.) Nor those which are out of their commerce; such are things sacred and religious.

13.) Neither can things which can only be got by prescription, by a possession of time immemorial, fall under prescription in the way of usucapion.

§ 25.

II.) A person may acquire by prescription also, in the second place, by way of usucapion, all kind of things incorporeal; so that a man who possesses fairly, (*bona fide*), and by virtue of a just title, a right of real or personal servitude on another's estate, may, after having exercised it for ten years, when the party is present, and twenty years when absent, secure it by prescription, and support himself in his possession by virtue of usucapion, (*jure usucapionis*.)

Likewise if one, during the time mentioned, draw from the proprietor of a subject, certain yearly rents, which indeed are not due to him, but which however he honestly believes to be due to him by the proprietor, after this time is elapsed, he gets by prescription, in the way of usucapion, not only what he has received every year, but even the right of drawing the yearly rent.

One may also get by prescription, in the way of usucapion, other rights on another's estate; for example, tythes, hunting, and jurisdiction, &c.

§ 26.

In order to acquire incorporeal things by prescription in the way of usucapion, the laws require,

1.) That the person who runs the prescription possesses another's right, (*jus alienum*); but as things incorporeal are not properly possessed, the exercise of a right on another's ground is reckoned possession, and a person who possesses this right is called a *supposed possessor*.

The laws require also, in the second place,

2.) Presumptive honesty, (*bona fides*), in the *supposed possessor*, that is to say, a belief that it is lawful for him to exercise this right on his neighbour's ground. An heir acts fairly (*bona fide*) when he exercises a right to a servitude, because he believes that the person from whom he inherited was intitled to use it. It is the same with a possessor who has acquired a right to a servitude from one who has not the property of the lands subjected to it, but whom he thought to be real proprietor of them.

3.) The laws likewise requires just titles.

The exercise of a right on another's ground is reckoned a just title, (*pro justo titulo*), when the possessor does not seize it violently, and exercises it neither privately nor in a manner purely precarious, (*non vi, non clam, non precario*.)

For there is a legal presumption that the proprietor of the ground knew of the exercise of the right of servitude, whence there is ground to conclude that he consented to it, since he did not object for so many years. In fine,

4.) The laws require also a continued possession in the usucapion of rights, which gives occasion to a distinction between rights whose exercise is continual, and such whose exercise is not continual, (*inter jura continua et discontinua*). The first fall under prescription by possession of ten years when parties are present;

sent; but the others cannot be acquired by a possession of less than twenty years. See below, book IV. tit. I.

§ 27.

Ufucapion of incorporeal things previously requiring a *supposed possession*, that is to say, the exercise of another's right, it thence very naturally follows, that there is no ufucapion when one is not in possession of a thing belonging to another: whence it results, that things of mere power, (*res merae facultatis*), that is to say, such as we may do, or leave undone, as we think proper, cannot be acquired by prescription: for as they depend on every one's will to use them or not, it cannot be said that the possession of another's right (*juris alieni*) can take place with respect to them.

N. 1. If then Caius do not build his house, or do not make windows in his wall, during the course of ten, twenty, or more years, but wants to do so afterwards, Seius his neighbour cannot hinder him to do so, nor object ufucapion, because he does not possess the right of Caius, (*jus alienum*), who might as he pleased heighten his own house, or leave it in its low condition.

N. 2. In the same way, if for ten, twenty, or more years, Caius have caused his grain to be ground in a mill which is not his own, or sent to fetch beer from an alehouse which does not belong to himself, and afterward want to grind elsewhere, or take beer from another brewer, the first miller, no more than the first brewer, cannot hinder him to do so; because not possessing another's right, (*jus alienum*), they cannot, under pretext of ufucapion, assume the right of objecting to it, (*jus prohibendi*), ufucapion having no place in such cases.

N. 3. In like manner, if Seius do not use for ten or twenty years the rights which he has on Caius's estate,

estate, and do not exercise them during all that time ; for example, the right of servitude, jurisdiction, tythes, or hunting, &c. which was granted him on that estate, and which he has the natural liberty to exercise or not, he may afterward still make use of his right ; and Caius, whose estate is subjected to the burdens mentioned, cannot hinder him from so doing, under pretext of usucapion. The reason of which is, that Caius does not possess another's right, (*jus alienum*.)

N. 4. It would be otherwise, if when Seius wants to exercise such rights, Caius object to it, and hinder Seius from using his right, and from the liberty which he has to exercise it when he thinks fit. If Seius acquiesce in this prohibition for ten or twenty years, in that case this right ceases to be of mere power ; that is to say, he is not at liberty to exercise it when he thinks proper ; and Caius, who has inhibited Seius from the use of it, begins to possess another's right, by which he has it in his power to run the prescription, (*in conditione usucapiendi*.) Indeed in this case the prohibition of Caius comes in place of possession, and the patience of Seius acquiescing in the prohibition, comes in room to the former of a title, and of presumptive honesty ; consequently all the conditions of usucapion meet in it.

It thence results,

1.) That if Caius intending to heighten his house, or to break through his wall to make a window in it, Seius should object to it, and the former should acquiesce in the prohibition for ten or twenty years, in this case Seius would acquire a kind of possession by the prohibition which he used, and a title by the silence and indulgence of Caius.

2.) That if Caius intending to exercise upon Seius's grounds his right of servitude, of jurisdiction, of usufruct, of tythes, or of hunting, &c. and being hindered from so doing by Seius, who prohibits him to exercise

those rights, he be silent for ten or twenty years; after that time is expired he loses his right, and Seius acquires in the way of usucapion the liberty of his grounds, which are thereby discharged of those burdens and services.

3.) That if Caius, after having employed a miller, or a brewer, incline to change them, and to grind or take beer elsewhere, and it happen that the miller and brewer, in prohibiting him to make this change, obtain thereby that for ten or twenty years, he cause his grain to be ground by them, or his beer to be bought from them, they acquire, by the way of usucapion, the right of obliging him to do so for the future.

N. 5. Moreover, it is not necessary that the prohibition be several times repeated, but it is sufficient that the person prohibited do not object to it directly nor indirectly.

N. 6. In fine, when several persons concerned in that kind of thing; or rights which are of mere power, (*in rebus merae facultatis*), and the prohibition was signified only to one of them, usucapion does not take place with respect to the rest.

§ 28.

Usucapion does not take place when the use of a thing is common to all men: whence it follows, that though Caius for ten, twenty, or more years, should not travel a high-road, or should not draw water out of a public river, or should not send his cattle to drink, &c. he would nevertheless be at liberty to do so after this time is elapsed; and that even though any one had prohibited him to do so, and he had acquiesced for ten or twenty years. The reason of which is, that nobody can assume the right of hindering and prohibiting the use of a thing common by the law of nations, and consequently the nature itself
of

of the thing does not allow to suppose in it the possession of another's right, (*juris alieni.*)

§ 29.

The same judgment must be passed concerning things which are out of the commerce of mankind, such as things sacred and religious, with regard to which neither is there any possession of another's right.

§ 30.

The effect of usucapion is,

a) To acquire to the person who runs the prescription the natural or civil property of a corporeal thing belonging to another; he may consequently dispose of it at his pleasure, or alienate it, &c.

Moreover, he does not acquire only by usucapion the property of a thing, or of a subject, but also all its consequences and dependencies*; consequently he acquires also what is added to grounds by alluvion. He has also, as civil proprietor, right to all the actions allowed to real owners, such as claim of right, &c.

b) When a right is prescribed in the way of usucapion on another's ground, a real right is acquired, by virtue of which that right may be exercised, and claimed against any possessor, by the action called *confessoria*.

c) When one has acquired by prescription the liberty of his own ground; that is to say, has obtained by usucapion an extinction of the burdens and duties, for example, of a servitude, to which it was subject; he may get himself supported in that liberty, by virtue of the action called *negatoria*, against all such as were before due by the ground.

Observe, that the effect of usucapion would subsist

[* *Suite*, the French word here used, signifies in law *mortgage*. Hence *Les meubles n'ont point de suite*, "The moveables are not mortgageable."]

even though a man should happen to be informed after the usucapion is finished, that he has got by prescription a thing belonging to another, or though the proprietor should want to prove his right of property by documents newly discovered; whence it follows consequently that neither could he obtain in those cases restitution to his right.

ART. II.

Of the prescription which takes place by a possession of thirty or forty years.

(De præscriptione.)

§ 31.

WE have treated, in the preceding article, of the prescription properly called usucapion. But as in usucapion there is required, besides possession, presumptive honesty, (*bona fides*), and a just title, it follows, that, in failure of one or other of these conditions, neither the possessor of another's subject, nor the person who holds it from him, are ever sure of being able to keep it as belonging to themselves.

§ 32.

Nevertheless the principle of public good, which wants to have the possession of things and rights at last once secured, finds also its application in the cases where a man, for thirty or forty years, does not redeem a subject, (*rem*), or a right, (*jus*), or does not exercise the right which he has on another's estate, nor raise the action to which he is intitled against his debtor, it is just in such cases to punish his negligence by the loss of the subject, or of his right.

This is the reason why no inquiry is made in those cases whether the possessor of the thing or right acted fairly,

fairly, (*bona fide*), nor whether he possessed in virtue of a just title, but solely whether the proprietor of a subject has let thirty or forty years elapse without claiming it, or whether a man who has a right on another's ground has not exercised it during all that time, or whether a creditor has allowed that time to elapse without suing his debtor.

§ 33.

The prescription in question in this article is nothing else but a method of acquiring a subject by a possession of thirty or forty years.

§ 34.

I.) That this prescription may take place, it is first requisite,

- a) That one possess a thing belonging to another.
- b) That one be in possession of a right on another's estate, and exercise it. Or, c) That one neglect to exercise a right which he has on another's estate. Or, d) That one do not exact what is due to him by virtue of a personal obligation, (*ex obligatione personali*).

§ 35.

II.) The laws require, in the second place, a time of thirty or forty years.

But there are none but such as are capable of doing a deed who can acquire a real right by prescription. See above, book II. tit. III. § 5.

Neither does prescription take place but against such to whom some negligence may be imputed. See below, § 38.

§ 36.

The prescription of thirty years takes place,

- I.) For all corporeal things. When then a person has possessed thirty years a thing belonging to another, he acquires the property of it by right of prescription, (*jure præscriptionis*). One acquires even
by

by this prescription of thirty years things which cannot be acquired in the way of usucapion, because in the prescription of thirty years there is no question either about presumptive honesty, (*bona fides*), or a just title, but solely to punish the proprietor for his negligence.

From the rule however are excepted,

1.) Things of which the property cannot be acquired; for example, things common, and those which are out of the commerce of mankind, such are things sacred and religious: for neither of them can be got by prescription, neither in the way of usucapion, nor by the prescription of thirty years.

2.) Things which cannot be prescribed but in forty years; see below, § 41. and following; or such as cannot be so but by a possession of time immemorial. See the following article.

The effect of the prescription of corporeal things is to procure to the possessor the property of the thing, with all the rights and actions depending on it.

§ 37.

II.) A person may also, in the second place, acquire by a possession of thirty years things incorporeal.

A man may then, 1.) Acquire on another's estate, by a possession of thirty years, a right of servitude, or of hunting, a yearly rent, tythes, &c. consequently the prescription of those rights is a just title, by virtue of which the person who runs the prescription acquires a real right.

One may, 2.) Acquire the liberty of his estate subjected to several burdens, when the person to whom those burdens are due does not exercise them for a course of thirty years.

In fine, one may, by this prescription, set himself at liberty from any obligation real or personal, when the person to whom he is bound, and who consequently has

has a right to sue him, lets forty years elapse without an action.

This is also the reason that the action of hypothec or mortgage, and that which is already once raised, (*actio semel mota*), are prescribed after thirty years.

Neither can one, after that time is elapsed, use his right of disengaging an estate, (*jus reluendi*), nor the faculty of redemption, (*jus retro emendi*), because the action *pignoratitia* is prescribed in the first case, and the action *empti venditi* in the second.

§ 38.

It is true, that the rights enumerated above, N. 2. and 3. are things of mere power and conveniency, (*res meræ facultatis*), of which the exercise should seem to depend on the good pleasure of the person to whom they are due. It seems indeed that he ought to be at liberty, for example, to use a right of servitude, a right to raise an action, &c.; nevertheless, as it is also the public interest that private persons should not entirely neglect those rights which they have on their neighbour's estate, it is likewise with reason that in such cases, the negligence of one who, for so many years, makes no use of his rights, or gives them up without prosecuting them, should be punished.

§ 39.

From the premisses it evidently follows, that prescription does not take place against a person to whom no negligence can be imputed.

If then a man for thirty or more years do not think proper to heighten his house, and after that time is elapsed want to do so, his neighbour could not hinder him on pretext of prescription; because being master, by virtue of his right of property, (*vi dominii*), to heighten or not to heighten his house, not the least neglect can be imputed to him.

In

In like manner, though a man have caused his grain to be ground at the same mill for above thirty years, the miller could not hinder him to get it ground elsewhere. The reason of which is, that no negligence could be imputed to the former, and that he used the mill of this miller only because it was convenient for him.

It would be otherwise if Caius intending to heighten his house, was hindered from so doing by his neighbour; or if intending to change his miller, he were hindered from so doing by the miller with whom he was wont to grind: if Caius acquiesce for thirty years in this prohibition, his neighbour and the miller acquire by their opposition another's right, (*jus alienum*); and Caius ought to impute it solely to himself, that he had suffered so many years to pass without supporting his right, and without getting the objection taken off; so that, in such a case, he is justly punished for his neglect.

§ 40.

Neither can the prescription of thirty or forty years be competent against those who were not in a condition to redemand from the possessor the subject belonging to him, or to exercise their rights, or raise their actions.

Whence it follows, that, if a man were hindered for a certain time to make good his rights, prescription cannot take place, till the thirty or forty years requisite in prescription be entirely elapsed. An example will clear up this matter: If a man suffer twenty-nine years to pass without claiming his right of property, or without exercising his right of servitude, or, in fine, without raising his action, and he happened to die afterward, prescription would cease to run with respect to the pupil whom he should leave after him; it would remain suspended, and the thirty years requisite for prescription would only begin to
run

run from the moment that the heir were twenty-five years complete.

§ 41.

There are some things which cannot be acquired but by a possession of forty years, namely,

- 1.) Such as belong to us, or to our exchequer.
- 2.) Such as belong to churches, or other pious communities; and
- 3.) Such as belong to cities.

The reason of which is, that, in all these cases, the fault is more on the side of such as have the administration, than on that of such as have the property of these effects; and this is the reason that the laws require a longer space for acquiring them by prescription.

§ 42.

There are even some actions which are never prescribed, and which may consequently be raised, even after thirty or forty years; namely, the actions,

- a) Against such as apostatize and turn Pagans or Jews, (*contra apostatas.*)
- b) Against such as have wounded divine or human majesty.
- c) Against such as have imposed a child on any one.
- d) Against assassins, (*ob crimen assassinii.*)
- e) Against false coiners.
- f) Against persons who procure abortion, (*ob crimen abortus*); and, in fine,
- g) Against such as, taking advantage of their power, and of their authority, or of a third person's interest, extort from any one things which fear alone makes him give.

§ 43.

There are also some things which can be prescribed

or acquired only by a possession of time immemorial.
See art. III.

§ 44.

On the other side, there are some things which may be prescribed by a possession of less than thirty years. They shall be treated of every one in its place.

§ 45.

The exception of prescription (*exceptio præscriptionis*) may be objected after litigation, and even at the time of execution, (*in ipsa executione*), if it can be proved immediately, and the party, as well as the advocate, swear that they knew nothing of it before. See the Frederician Code, part III. tit. X. § 7. and 30.

When the party neglects to make this objection, the judge can never supply it of himself, because it is an exception founded on a fact, (*quæ facti est.*)

A R T. III.

Of the prescription which takes place by a possession of time immemorial.

(*De possessione immemoriali.*)

§ 46.

There are some things of such value, that they can only be acquired by a possession of time immemorial; that is to say, a possession whose beginning is not known, (*cujus in contrarium non extat memoria.*)

§ 47.

A certain number of years cannot be determined for this prescription, because it happens frequently, especially in time of pestilence or war, that, in a little time, the beginning of a possession may be forgotten, and how the possessor attained it.

§ 48.

§ 48.

It is indeed sufficient that it be not known when the possessor entered into possession, and how he attained it. This prescription would not then be interrupted or hindered, though it were evident, or could be proved that the thing formerly belonged to another, by right of property, or was formerly crown-lands destined for the support of the prince's table (*tafelguth*), or subject to contribution; or, in fine, that, in distant times, the pretended rights of hunting, jurisdiction, tolls or customs, &c. were not annexed to the lands.

§ 49.

Thence it follows, that men may acquire in general, by an immemorial possession, all subjects, concerning which it is not evident, when and how they came to possess them.

§ 50.

Wherefore also all subjects and rights, which may be prescribed in the way of usucapion, or by a prescription of thirty or forty years, may also be acquired by a possession of time immemorial.

§ 51.

Possession of time immemorial is requisite in particular, when any of the royal rights are to be prescribed. For as those rights cannot be possessed by any private person, without a grant from the sovereign, it is not presumed that such grant was given, unless those rights have been exercised from time immemorial.

This method of acquiring shall, for the future, only begin by reckoning from the year 1740, and from the day of our accession to the throne; for we have declared in our Frederician Code, with regard to the past, that all such as were then in possession of royal

rights, without having attained them secretly, or precariously, or forcibly, (*non vi, non clam, non precario*), ought to be supported in them.

§ 52.

Nevertheless this prescription takes place only with respect to royal rights of less importance, which are called minor, (*in regalibus minoribus*); for example, the rights of hunting, of toll or custom, of the coasts, of jurisdiction, also the right of brewing, and others which shall be acquired by an exercise of time immemorial.

In like manner is acquired an estate, making part of the crown-lands, destined for the support of the prince's table, when it is possessed from time immemorial, and it is not known at what time it came to the possessor, or to those from whom he derives right: it is presumed, in this case, that it was alienated with consent of the states, or of such as were interested in it, by virtue of an exchange, or of some other just title.

It is for the same reason, that by an immemorial possession may be acquired an exemption from contributions, when the estate or lands are not entered in the register or roll of contributions; for there is a legal presumption that that was done for good reasons; for example, because the estate was a fief, or because it belonged to a church, or because the possessor had merited an exemption by services which he had performed, or because the states gave their consent to it, &c.

§ 53.

The more considerable royal rights, which are called greater, (*regalia majora*), and which are annexed to the sovereignty, are no more subject to prescription than the sovereignty itself, supposing even one had possessed them from time immemorial,

No

No private person then can acquire by prescription,

a) The right which the sovereign has over all the lands in his dominions, (*jus territorii.*)

b) Nor be freed by prescription from the fidelity due to him, nor acquire by that means,

c) The right of arms (*jus armorum*), or,

d) The right of making laws, or,

e) The right of making collections, or of raising taxes, and of raising duties and customs; or,

f) That of making treaties of alliance, even though he had exercised those rights from time immemorial.

§ 54.

In the prescription which takes place by possession immemorial, there is no question about presumptive honesty, nor a just title. For it is supposed that it is absolutely unknown at what time, and in what manner, the possessor got his possession.

§ 55.

A person who alleges an immemorial possession must prove it, and the proof must be by credible witnesses.

The deposition of the witnesses must turn upon the following articles, and they must declare,

1.) That the present possessor has possessed the subject, or right in question, during all the time that they can remember; 2.) That they never heard the contrary said by their ancestors; and, 3.) That they do not know how the subject or right came to the present possessor or his ancestors.

The possessor is also at liberty to prove his possession by documents. On the other side, it is with much justice, that a proof to the contrary is reserved to the exchequer, by allowing the fiscal to prove that the possessor, or his ancestors, unjustly acquired the possession, and that consequently it is evident the beginning of it was vitious, (*memoria initii vitiosa.*)

T I T L E

T I T L E VI.

Of the civil property which creditors have in the effects which their debtor has alienated to defraud them.

(De actione Pauliana.)

§ 1.

WHen a debtor, in connivance with a third party, or with one of his creditors to defraud the rest, diminishes his effects purposely, either by selling them or pawning them to that third party, or by settling a portion or dowery, or by being guilty of any neglect, which may occasion a diminution of his means, the creditors, by the law of nature, have no action against the person to whom the debtor has sold any thing to their prejudice, and cannot consequently redemand it. They have only a personal action on account of the fraud (*actionem personalem ex dolo*) against the fraudulent debtor who gained by such undue practice.

But since the laws have declared such fraudulent alienation null, and consequently the things alienated by the fraudulent debtor remain a part of his stock, the laws have also attributed to the creditors, who came in place of this debtor, a fictitious property, (*fictum dominium*), and have allowed them a real action.

By virtue of this action, the creditors may redemand the subject alienated by the fraudulent debtor, from any possessor who has a concern in the fraud.

This action is called a Paulian action.

§ 2.

That a Paulian action may take place, it is requisite,

1.) That

1.) That the debtor alienate his effects, or that he do, or neglect something, and that, by such steps, his effects be wasted.

2.) That he do so maliciously, (*dolose*); that is to say, with a design to defraud his creditors.

3.) That the person who wants to redemand the effects alienated, to defraud the creditors, be really himself a creditor at the time of the alienation.

4.) That, by this fraudulent alienation, the creditors be really and effectually losers and sufferers.

5.) That the person who, by the debtor's deed, has acquired any thing from him, have known that the debtor's intention was to cheat his creditors, and have consequently been a partaker in the fraud, and a gainer by it.

6.) That the creditors have no other way, nor no other action, to get what is due to them.

§ 3.

It is requisite, in the first place, that the debtor alienate his effects, or that he do or neglect something; and that, by so doing, he suffer a diminution in his fortune. In the following section will be seen when and how that happens.

§ 4.

It is requisite, in the second place, that the debtor act maliciously, (*dolose*); that is to say, with an intention to cheat his creditors, and deprive them of their right.

Though fraud be not usually presumed, and consequently ought to be proved, it may nevertheless be inferred from several circumstances; for example,

a) When a debtor, at a time when he is not solvent, alienates a part of his effects at a very small price, and below their value, were it even in favour of a relation.

b) When having borrowed upon a hypothec, pawn, or

or mortgage, he squanders the money instead of paying his debts, and reimbursing his creditors.

c) When he gives his daughter a portion above her station, and his own fortune.

d) When he neglects to raise the actions which he has against others.

e) When he restores a pledge given him for his security; or,

f) When he desists from a hypothec or mortgage made in his favour.

g) When he pays one creditor in preference to the rest.

h) When he becomes surety for others.

i) When he lends money to people whom he knows to be insolvent.

k) When he renounces a succession, or a legacy, which have fallen to him, were it even in favour of his own children.

l) When he voluntarily suffers a right to prescribe which is due to him.

m) When he suffers himself to be condemned for want of appearance.

n) When he changes an allodial estate into a fief; and, in general, when he acts deliberately, in a manner which shows that he has an intention not only not to increase his fortune, and not to exact what lawfully belongs to him, but even to render his condition worse.

In all the cases just mentioned, and in other like cases, it is presumed that there was fraud on the debtor's side. The effect of this presumption is, that the fraudulent debtor may be punished for his fraud, even though the person who has acquired a thing from him had acted fairly, (*bona fide*), and consequently the agreement should subsist. He may even be detained in prison by his creditors till he has satisfied them; and he would not be set at liberty, even though he

he should want to make a cession of his effects to them.

§ 5.

It is requisite, in the third place, that a person who pretends to raise the Paulian action, to get revoked what was alienated to defraud creditors, be really a creditor at the time that the alienation was made, or that he have succeeded to the right of a person who is really a creditor.

If then the debtor found means to satisfy the creditors, whom he had deceived at the time of the alienation, and afterward contracted new debts, the new creditors could have no claim to the things alienated before.

We reckon also as creditors,

1.) A person who is nominated trustee in a competition, because he ought to take care and preserve the rights of the creditors.

2.) Legataries and feoffees in trust, when the heir commits any fraud, with respect to a legacy or feoffment in trust, left to them by the defunct.

3.) The heirs and particular successors of a creditor, who has been deceived by a debtor.

4.) A person who has lent money to the debtor, to satisfy former creditors, to whose prejudice the debtor has alienated his effects. For this new creditor, entering upon the right of those who were paid with his money, may consequently redemand the things alienated.

5.) A spouse, to whose prejudice the other joint spouse has diminished the statutory portion, (*portionem statutariam*.) See part I. book II. title IV. art. VI. § 154. at the end, and 155.

6.) But a father may make alienations to the prejudice of his childrens legitim, (*in fraudem legitimæ*), because they are not creditors of their father, and that, during his life, they have no right to his effects; as

children can claim no legitim but in the effects which their father leaves at his death.

§ 6.

It is requisite, in the fourth place, that the creditors be effectually cheated and wronged by their fraudulent debtor. A simple intention then to defraud creditors in a debtor, and the person who, partaking in his fraud, is in possession of the thing alienated, is not a sufficient title for raising a Paulian action against that possessor, unless by the event the creditors be effectually defrauded and be losers.

This action consequently does not take place when it is notorious that the debtor is solvent; and, in this case, the possessor of the thing alienated may demand that the debtor's effects be previously discussed. But this discussion of the debtor's effects does not take place,

a) When it appears, from the inventory of the debtor's effects, that the creditors cannot get their payment immediately and without entering into law-suits: for in that case no regard is paid to the demand of discussing of the debtor's effects, and the person who has unfairly acquired the thing alienated to defraud the creditors, is bound to restore it immediately, and may be constrained to do so by an execution. Or,

b) When the fraudulent debtor was obliged to give a thing of a certain species, (*speciem*), in which case the possessor participant in the fraud is obliged to deliver it immediately, and the creditors are not obliged to wait till an inventory of the debtor's effects be made, or till those effects be sold.

§ 7.

In fine, it is chiefly requisite, that the person who has acquired a thing from a fraudulent creditor, having

ving knowledge of the fraud, profit by it, and consequently make himself an accomplice in the deceit.

To obtain then a right to sue a Paulian action, it is not sufficient that the debtor be guilty of a fraud, but also that the person who has acquired the thing from the debtor must have a share in the fraud.

N. 1. But as it is not presumed that a person who has acquired a thing from a fraudulent debtor should have a share in the fraud, it must lie on the creditors who redemand the thing to prove it.

N. 2. This proof however may also be made by presumptions taken from circumstances. For example,

a) The fraud is reckoned as proved when one of the creditors, or a third party, buys from a debtor known to be indebted and prosecuted by his creditors, a thing below the half of its value. In this case the Paulian action takes place, and the buyer is obliged to restore the thing to the defrauded creditors, and cannot demand the price of the purchase though the thing itself were sold to a relation.

But if one of the creditors, or a third party, buying a thing in fact below the half of the value, nevertheless pay for it a third less than its worth, a distinction must be made in this case, whether the buyer knew that the debtor was indebted or not.

If he knew the bad condition of the seller's affairs, the defrauded creditors may take back the thing, on reimbursing him the price of the purchase, with interest and expenses for meliorations; or else they may oblige him, after having valued and auctioned the thing, to pay the surplus of its real value. But,

If he were ignorant of the seller's bad situation, and consequently bought fairly the thing for a price less than the third of the real value, it depends on him either to make up what is wanting of the real value, or to restore the thing itself.

b) Fraud is also reckoned proved with respect to a creditor who caused his obligation or bond to be antedated: for that cannot be done but with a view to defraud creditors anterior to him, of their right of preference.

c) But a creditor cannot be proved fraudulent who, knowing that his debtor is not solvent, solicits and timeously gets his payment, even though other creditors had applied before or at the same time to the debtor, to be likewise paid of what was due to them. Neither is there any fraud in a creditor by bond, who seeing that his debtor is becoming insolvent, takes for his security a right of hypothec or mortgage; nor in a creditor by hypothec or mortgage, who for the same reason causes his hypothec or mortgage to be inserted in the register of mortgages: for the demand which a man makes for what is due to him cannot be reckoned as a fraud, nor the care that he takes for the preservation of his rights.

It would however be otherwise, if the creditor who gets his payment, or one of the other creditors, had got, before payment, access to possession (*immissionem*) of the debtor's effects, or of a part of them. In this case the Paulian action would take place, because the access to possession (*immissio*) got by one of the creditors, ought to be for the advantage of all the other creditors; and that one who wants to profit of it alone, and to deprive the other creditors of the right which is common to them with himself, acts unfairly, and is guilty of a real fraud.

If then after the entry into possession the debtor pay one of his two creditors on bond, to the prejudice of the other, this payment will give no right of preference to the person to whom it was made, and they will receive each proportionally to what is due to them, (*in tributum*).

And if after entry into possession a payment had been

been made to a creditor on hypothec or mortgage, to the prejudice of a creditor anterior to him, and as much privileged as he, or if one who, on account of the privilege of his debt, ought to be preferred to him, the first creditor who has got his payment would be obliged to restore the whole to the other.

N. 3. Nor would there be any fraud in a creditor, who pursuing his debtor who has fled, overtakes him, and gets his payment willingly, or by force, even though this creditor should certainly know that the others will lose all that is due to them. The reason of which is, that the other creditors would likewise have got nothing of the money which the debtor had carried off, even though the person who pursued him had not overtaken and stopped him; whence it follows, that this last having pursued the debtor at his own charge and risk, ought also to enjoy the advantages arising to him from it. It would be another thing, if one of the creditors had already got entry into possession of the debtor's effects, which ought to be communicated to all the other creditors, as has been observed in the preceding number: but, on the other side, the rest of the creditors must indemnify of all his charges the creditor who pursued the fugitive debtor.

N. 4. In fine, it must be observed, that it is often very difficult to prove fraud, and for that reason the creditor should be at liberty to put an oath to the person who possesses a thing on this fact, namely, whether at the time that he acquired the thing from the debtor he did not know that he was insolvent? and whether, consequently, he did not know that the debtor's intention in putting the thing into his hands was to deprive the creditors of their right, and to defraud them?

§ 8.

There are some cases in which the Paulian action takes

takes place, though the person who has acquired a thing from a fraudulent debtor did so fairly and honestly; for example,

1.) Every thing which comes to a third person gratuitously, (*ex titulo lucrativo*); that is to say, every thing that he gets by the pure liberality of the debtor, (among which are also reckoned legacies), may be redemanded from him by virtue of the Paulian action: for in this case equity demands that the creditors be preferred, who, by the debtor's fraud, are put to loss, to the person who would make a gain by this fraud, to the prejudice of his creditors, even though he had acted fairly.

This last, moreover, who has acquired a thing gratuitously, cannot be obliged to restore it, but in so far as he possesses it, or has been enriched by it.

2.) When a fraudulent debtor alienates a thing to defraud the exchequer, a city, or a pious community, or diminishes in any other manner his effects to their prejudice, and renounces, for example, a succession, or a legacy, they may, by virtue of the Paulian action, redemand the thing itself from the *bona fide* possessor.

3.) As to a pupil, in whose favour a fraudulent debtor has alienated any thing, he cannot be bound, even when his guardian knew of the fraud, but in so far as he made any gain by that fraud.

§ 9.

There is also a case in which the Paulian action does not take place, though the buyer knew that the debtor alienated a subject to defraud his creditors.

It is when the subject was advertised, and publicly auctioned; for thereby the sale is notified to the creditors, and sold with their knowledge: whence it follows, that they ought to blame themselves for not protesting against the sale, or for not attaching the price.

§ 10.

By what goes before we see in what manner the question ought to be decided, whether the Paulian action takes place when a fraudulent debtor settles in favour of his daughter a portion much larger than his own fortune allows.

For it is incontestable,

a) That if the son-in-law be a partaker in the fraud and unjust intention of his father-in-law, and the daughter have no knowledge of it, the action takes place only against the son-in-law.

b) But if the daughter alone knew of the fraud, and became an accomplice in it, without the participation of her husband, she alone could be sued, and obliged to restore the value of the portion to the creditors. If she have no fortune, the creditors might oblige her husband to give surety for restoring to them the portion after the dissolution of the marriage.

c) If the husband and the wife have equally participated in the fraud, the Paulian action may be raised for the whole against both.

d) But if both acting fairly be ignorant of the fraud, the action does not take place against the husband, because he got the portion for an onerous cause, (*titulo oneroso*); and it has no other effect against the wife but to oblige her to restore the portion which she got from her father gratuitously, when it returns to her after the dissolution of the marriage; for that reason also she is obliged to give them security on that head.

§ 11.

It is requisite, in the sixth place, that the creditors have no other way of getting what is due to them.

Wherefore a creditor who has a right of hypothec or mortgage on his debtor's fortune cannot raise against him a Paulian action: for he may sue every possessor,

possessor, and get his payment by an action of hypothec or mortgage.

In like manner, when a debtor leaves a legacy to a third person to defraud creditors, neither does the Paulian action take place, because legacies are not valid, and cannot be discharged till after the debts are previously paid, so that creditors have nothing to dread from such a settlement which cannot hurt them.

§ 12.

The laws allow also the Paulian action to the heirs of creditors who are wronged by the fraudulent alienation of a debtor. But it is not allowed to the heirs of a fraudulent debtor who has done any thing to their prejudice. The reason of which is, that they are answerable for the deeds of the person to whom they succeed.

§ 13.

The Paulian action takes place against all possessors, creditors or others, who, knowing the debtor's fraud, have been partakers in it, and received any thing by it.

§ 14.

The heirs of the fraudulent debtor, as well as the heirs of the partaker in the fraud, may be sued according as they act fairly or unfairly, by observing what is ordained on this head in the title of claim of right.

§ 15.

It has already been observed, that if the creditors get nothing from the possessor, they may sue the fraudulent debtor himself, and put him in prison till they be satisfied. See § 4. above.

§ 16.

The effect of the Paulian action is to render null by law all that has been transacted and done to defraud

fraud creditors, and consequently to restore things to their former condition.

Wherefore the fraudulent possessor is obliged to restore to the creditors all that he has acquired from the debtor, with the interest and the fruits, both such as he has received, and such as he might have received after the time of the alienation, and also to be accountable to them for their damages and charges.

This possessor cannot even redemand the price which he has paid, unless the money be still in specie in the debtor's hand.

The fraudulent debtor is also obliged to yield to his creditors the actions which he has renounced, the rights which he has neglected to prosecute, and the successions which he has rejected, &c.

In general, the fraudulent possessor is also bound for every thing chargeable on other unfair (*mala fide*) possessors.

§ 17.

The Paulian action is to be raised within the space of a year: but this year does not begin to run till after the time that the creditor was informed that the alienation was made maliciously, and to defraud creditors; that is to say, after the debtor's effects were sold, or the insufficiency of his effects appeared by the inventory made of them.

After the expiration of the year, the Paulian action has no longer place, unless the possessor was enriched by a deed of the debtor; if then the possessor had bought the subject below its price, he would be obliged to pay the real value of it.

§ 18.

Neither would the Paulian action take place, if the creditor had become heir of the debtor, or of the fraudulent possessor, or if either had succeeded to the creditor.

T I T L E VII.

Of the method of acquiring civil property by a person who, not being proprietor of the thing, comes to lose the possession of it, when he was in a way, and had a right to acquire it by prescription in the way of usucapion.

(De Publiciana in rem actione.)

§ 1.

THE laws have granted the civil property in the following case, namely, when a man who is in a course, and has a right to get by prescription a thing belonging to another in the way of usucapion, (*in conditione usucapiendi*); that is to say, possesses it fairly and on a just title, (*bona fide et justo titulo*), after having possessed it for a long time, comes afterward to lose it; and when consequently this interruption of possession hinders him from finishing the usucapion.

§ 2.

According to the fundamental rules of law, a man who has acquired a thing belonging to another, though fairly, and by a just title, has however no real action against the possessor: for as he cannot prove his right of property in the thing, he might be cast in his demand; because the actual possessor might object to him that he is not the proprietor, (*exceptio tu non es dominus.*)

Nevertheless, as it would not be equitable that a person who is in a course, and has a right to get by prescription a thing in the way of usucapion, (*in conditione usucapiendi*), should be rendered incapable of finishing the usucapion by the injustice of a third party who detains it, the laws have supposed that the first
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was effectually proprietor of the subject, and have allowed him, in consequence of this supposition, a real action, by which he may claim or demand the thing from the actual possessor. This action is called *actio Publiciana in rem*, a name which it has taken from its author. But the laws have granted this action only against a possessor *infirmiori titulo*, that is to say, who has still a less title than that of the person who claims or demands it.

§ 3.

The Publician action is then a real action, by which a person who possesses fairly and on a just title a thing not belonging to himself, may, when he comes to lose possession of it, redemand it from any possessor who has not a title equal to his own, or better than his.

§ 4.

The foundation (*causa*) of this action is taken from the supposed property; as the laws declare the person who has not really the property of a subject proprietor of it, that he may redemand or claim it.

§ 5.

It is then requisite,

I. In the first place, that a person who wants to raise this action be not the real proprietor of the subject; whence it follows, that a Publician action ought not to be granted to the true proprietor, because he redemands the subject lost by a direct claim of right: nevertheless, if he think proper, on account of the difficulty which often happens in proving one's right of property, not to allege it, he may be allowed to satisfy himself with raising, in quality of a fair possessor, the Publician action against such as possess the subject on a weaker title than his own, or even to join the two actions.

That a person may have power to raise a Publician action, it is requisite,

II. In the second place, to be in a course, and have a right to get by prescription in the way of usucapion, (*in conditione usucapiendi*), that is to say, to possess the thing belonging to another fairly, and by a just title. In fine,

III. It is requisite that the possessor enjoy the thing by virtue of a title less than that of the person who raises the Publician action; whence it follows,

a) That this action can never be raised against the real proprietor, because he has also a better title, (*potiorem titulum.*)

b) That a man who has possessed a subject on the title of heir, (*titulo pro herede*), and has lost possession of it, cannot raise this action against one who has acquired it by purchase, or by any other real title; for it may happen that a man may possess as heir things deposited in the hands of his predecessors, or which were lent to him, &c. (*res depositas, commodatas, &c.*)

§ 6.

Not only such as have acquired a subject by virtue of a title transferring property, (*ex causa dominii translativa*), may raise the Publician action, but also all such as have besides any other real right; for example, a right of servitude, of pledge or pawn, &c. provided always that they raise it only against such as have a weaker title than their own: whence it follows, that a person who has possessed a subject only in virtue of a right of servitude, cannot raise this action against one who possesses it in virtue of a right of advantageous property; but an usufructuary has a good right to raise this action against a person who possesses it only as a deposit, (*ex titulo depositi.*)

Observe also, that this action does not take place when a person who wants to redemand a subject, and the

the actual possessor have both a right of civil property, (*dominium civile*), or any other title of equal validity.

§ 7.

Heirs who are in a course, and have a right to get by prescription a subject in the way of usucapion, (*in conditione usucapiendi*), may likewise raise a Publician action against the possessor and his heirs.

§ 8.

By this action may be redemanded or claimed all the subjects and rights which can be got by prescription in the way of usucapion, and which the possessor has not yet acquired by prescription.

§ 9.

The effect of this action is to hinder usucapion from being interrupted.

§ 10.

All that has been determined relating to fruits, meliorations, waste, expenses, and casualties or accidents, in treating of claim of right, book II. tit. IV. art. I. ought to be applied to the Publician action.

§ 11.

This action comes to an end,

1.) By what is called confusion, (*per confusionem*), when a person who is in a course, and has a right to get by prescription a subject in the way of usucapion, (*in conditione usucapiendi*), becomes heir of the person who is its real proprietor, or of the new possessor, and when either of these last succeed to the first.

2.) This action is also extinguished, when the person who is in a course, and has right to get by prescription in the way of usucapion, (*in conditione usucapiendi*), is obliged immediately to restore the subject for another cause, (*ex alia causa*); for example, if it were a beast which a man wanted to redemand by a Publician action, and he were obliged to deliver it to
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the possessor by virtue of an action of deodand, (*ex causa noxali.*)

3.) The Publician action also ceases to take place, when a man who is in a course, and has a right to get by prescription in the way of usucapion, (*in conditione usucapiendi*), may be cast in his demand, and his right eluded or destroyed by a peremptory and perpetual exception, (*exceptione perpetua*); for example, two partners sell to Seius a thing which does not belong to them, and one of them delivers it to him while the other partner objects to it, though he consented to the sale, and consequently ceases thereby to have a right to get it by prescription, (*in conditione usucapiendi.*)

In this case this last could not raise a Publician action against the buyer, because his demand might be eluded by an exception of fraud, which the possessor might object to him, since in reality he would sue against his own proper deed.

The Publician action also comes to an end, when the person who intents it has his right of property only in consequence of a perjury, and the possessor can prove it immediately, in which case he may allege this fact on giving in his defences, &c.

T I T L E VIII.

Containing some other methods of acquiring civil property, (dominium civile), and the places in which they are treated.

THERE are still several other rights of civil property, besides those which have been explained in the titles immediately preceding. There are some which have not yet been treated of, and others which have been already handled: among these rights is, for example,

I.) Civil

I.) Civil property, which takes place when the proprietor gives to one an estate as a fief. This shall be treated of in the feudal law.

II.) The civil property which a husband acquires, when his wife gives him an immoveable subject as a portion. See part I. book II. tit. IV. art. I. § 65.

III.) The civil property which a testamentary heir or legatary acquires. See below, the title of wills and that of legacies. In fine,

IV.) All the rights of civil property, which have been treated of above, book II. tit. IV. art. I. § 29.

B O O K IV.

T I T L E I.

Subject of the fourth book.

§ 1.

AFTER having treated in the preceding book of the first real right, namely, of property, and of the methods of acquiring it, we are now, in this fourth book, to treat of the second real right, or of the right of servitude, whose nature in general shall be explained in the second title.

§ 2.

In title III. we shall treat of the first personal servitude, (*de servitute personali*), namely, of usufruct, (*de usufructu*), and, in particular, of the real usufruct, (*de vero usufructu*), which takes place when one has a right to enjoy another's estate, but without suffering the substance of it to perish by the use, (*salva substantia rei.*)

§ 3.

§ 3.

In title IV. we shall treat of the supposed usufruct, (*de quasi usufructu*), which takes place when the usufruct is given of things which perish in the use.

§ 4.

But as an usufructuary is bound to give surety, it shall be mentioned, in title V. in what manner the security is to be made, and what surety the usufructuary is to give.

§ 5.

In title VI. shall be shown the day on which the usufructuary makes an acquisition of a real right, and begins to enjoy his right.

§ 6.

In title VII. we shall explain the actions which arise from the usufruct.

§ 7.

In title VIII. we shall treat of the second personal servitude, namely use, (*de usu*.)

§ 8.

In title IX. we shall treat of the third personal servitude, namely, of inhabitation, (*de habitationis servitute*.)

§ 9.

In title X. we shall treat of servitudes on heritages or estates in general, (*de servitutibus prædialibus in genere*), and, in particular, in art. I. of servitudes on town-heritages, and in art. II. of servitudes on country-heritages.

§ 10.

In title XI. we shall explain the actions allowed, both to a person who pretends to have a right of servitude, and claims it, and to one who denies that right to be due.

§ 11.

§ II.

In title XII. shall be enumerated the methods by which the rights of servitudes are extinguished.

T I T L E II.

Of the second real right, or of servitude in general.

(De servitute in genere.)

§ I.

A Second real right is that of servitude.

§ 2.

Servitude is the real right which any man has in the subject, or estate, belonging to another, by virtue of which the proprietor of the subject or estate is obliged to suffer, or not to do, certain things, and that to the advantage of the person to whom this right is due, or of his heritage.

N. I. It thence necessarily follows, that there is no servitude which can oblige the proprietor of the servient estate to do any thing upon it; for the aim of all servitude is to procure a real advantage to the person who has the right of servitude, and to his heritage. Which does not happen by promising to any one to do a thing in our own proper estate. (*Lib. 15. § 1. ff. servitut. ibid. Servitutum non ea natura est, ut aliquid faciat quis (veluti viridaria tollat, aut amœniorem prospectum præstet, aut in hoc ut in suo pingat), sed ut aliquid patiatut aut non faciat.*)

When then Caius promises to Seius to pull out the trees of his garden, to make walks in it, to cause his house to be painted, &c. he does not thereby give him a right of servitude; because all that brings no real advantage to Seius's estate.

So such promises can operate only a personal action in favour of Caius, to oblige Seius to make good the agreement, (*actionem personalem ex pacto ad id quod interest.*)

N. 2. It may happen, nevertheless, that, in case the person, to whom the right of servitude is due, cannot use it, unless the proprietor of the servient estate do certain things in his own estate, that this last may be obliged to do them. For example, if Caius had granted to his neighbour Seius a right to support the burden of his house upon his own, (*servitutem oneris ferendi*), Caius would be obliged to maintain and repair the wall which supports Seius's building.

In this case, nevertheless, the right of servitude does not consist in the obligation of repairing the wall, but in that of suffering Seius to use it for bearing the burden of his building. And that is the reason that Seius may indeed get that reparation by imploring the aid of the judge, (*imploratione officii judicis*), but he cannot ask it by virtue of the real action called *confessoria*.

§ 3.

According to the law of nature, servitudes do not belong to real rights, (*ad jura in re*); and when a person gives to another any use of a subject belonging to him, or any other right to the subject, he acquires only a personal action, (*actionem personalem.*) For the use and right being due to him only by virtue of an agreement or covenant (*ex pacto*), there arises from it only a personal obligation, (*obligatio personæ.*) We have, moreover, already shown the reason that the laws have put rights of servitudes among real rights. See above, part II. book III. title II. § 7.

§ 4.

I. In the first place, servitudes are distinguished into personal and real, (*in personales et reales.*)

By

By personal servitudes are understood such as have not been constituted for the advantage of an estate, (*prædii*), but which have been granted on another's estate, only for the use of a person.

N. 1. The Roman laws enumerate four kinds of personal servitudes, namely, 1.) Usufruct; see the third title following. 2.) Use; see the fourth title. 3. Inhabitation; see title V. And, 4.) The services of slaves, (*opera servorum*.) But as, in the countries under our government, there are no slaves, on whom any one has a right of property or slavery, the servitude which consisted in the work of slaves (*in opere servorum*) has no place there.

It thence follows, that, by promising to another one's services or work, either *gratis* or for wages, (*pro mercede*), a right of servitude is not constituted, nor consequently a real right; and the person to whom the promise was made has only a personal action, to obtain what is due to him by virtue of the promise made to him, (*actionem personalem ad id quod interest*.) Observe, moreover, that if a man be obliged to perform any work, for the advantage of a neighbouring estate, either by himself or by his tenants, it is not a personal servitude, but a real one.

N. 2. Real servitudes are such as are not constituted in favour of a person, but for the use and perpetual advantage of an heritage, on a neighbouring heritage, either in town or in country.

Real servitudes are also distinguished into country-servitudes, (*in servitutes rusticas*), which take place when they are constituted in favour of a country-heritage; and into town-servitudes, (*in servitutes urbanas*), which take place, when they are established for the advantage of a town-heritage. See below, title X. § 5.

§ 5.

II. Servitudes, in the second place, are distinguished into continual and interrupted, (*in continuas et discontinuas*.)

continuas.) The first are those used perpetually, without interruption; the second are such as the possessor can enjoy only for a certain time.

N. 1. As this distinction has occasioned different interpretations, it must be laid down as a fundamental, that all servitudes have a perpetual cause, but not a continual one, (*causam perpetuam, sed non continuam*); by which must be understood, that the right of servitude is, and remains always the same, though its use be interrupted from time to time. For example, a right of servitude concerning the water which falls from a neighbour's roof (*stillicidio*) is perpetual, because it will rain till the end of time; but it is not continual, because it does not rain continually. The same is the case as to other servitudes, whose use is not continual, (*de servitutibus discontinuis*.) Such are servitudes concerning smoke, common sewers, and all other country-servitudes, (*servitutes fumi, cloacæ, rusticæ*.) But among continual servitudes are reckoned, the right that one has to support the weight of his house upon his neighbour's, the right of placing his beams in his neighbour's wall, the right of hindering his neighbour from building above a certain height, &c. (*oneris ferendi, tigni immittendi, altius non tollendi, &c.*); because the use and advantage of those rights are never interrupted.

N. 2. The effect of this distinction consists in this, that servitudes whose use is continual, may be got by prescription, by a possession of ten years, when parties are present; whereas such whose use is not continual, (*discontinuae*), cannot be acquired by prescription, even when parties are present, but by a possession of twenty years.

§ 6.

III. In fine, servitudes are distinguished into positive (*affirmativas*) and negative (*negativas*). Positive servitudes

servitudes are those by virtue of which the proprietor of a subject is obliged to suffer certain things in it, as happens in the servitudes called *stillicidii*, *oneris ferendi*, *tigni immittendi*, *itineris*, *actus*, *via*, &c. Negative servitudes are those by virtue of which the proprietor of a subject is obliged not to do certain things in it, and that for the advantage and benefit of a neighbouring subject; such are the servitudes called *altius non tollendi*, *ne luminibus efficiatur*, *stillicidii non avertendi*, &c.

§ 7.

All servitudes, personal or real, are established, either,

- 1.) By the laws, see below, title III. § 5.; or,
- 2.) By the sentence of a judge in decrees of division, (*arbitrio judicis in judiciis divisiis*), *ibid.*
- 3.) By an agreement between living parties, or by a settlement in prospect of death, *ibid.*
- 4.) By prescription. See above part II. book III. tit. V. § 24. and following.

§ 8.

Nobody can establish a right of servitude, but a man who is master of his own estate, and who has the free administration of it. When then there are several proprietors of a subject, none of them can establish a right of servitude on that subject, without the consent of the rest, unless the subject has been divided, and each of them has had his separate and determinate share (*pro diviso*), in which case every one may constitute a right of servitude for his own share.

But if the proprietor of a subject had promised in his lifetime a right of servitude on that subject, and had left several heirs, one of the heirs might, even contrary to the inclination of the rest, allow the exercise of that right to the person to whom the defunct promised it.

N. 1. Such as have a right of civil or revocable property, (*dominium civile vel revocabile*), for example, vassals, leaseholders, and such as are called *superficiarii*, as well as fair (*bona fide*) possessors, who are reckoned in certain respects real proprietors, have a right to burden their heritage with servitudes. But they cease also when the right of revocable property (*jus domini revocabilis*) happens to cease.

N. 2. A legatary, to whom an heritage has been left in legacy on a certain condition, may also burden it with a servitude; but it has its entire effect only when the condition happens to exist. Whence it comes to pass, that a person who is one day to have the property of a subject or heritage, may also burden it with a servitude, because the promise which he makes of a right of servitude includes the tacit condition, that it shall not take place till he have acquired the subject.

N. 3. A husband may also constitute a right of servitude on the dotal estate which his wife has brought him, though he have in that estate only a right of civil and revocable property, (*dominium civile et revocabile*), but the servitude comes to an end when the marriage is dissolved; unless the dotal subject were given on estimate, or the husband made no gain by the portion; in which cases the servitude would be perpetual.

N. 4. It follows, that a person who is not owner of an estate, cannot subject it to a right of servitude, and that is the reason that the usufructuary of a thing, even the usufructuary of the whole effects, can neither promise, nor establish a servitude. That is also the reason that a man cannot burden, with a servitude, the things which are common by the law of nations, or which are out of commerce.

N. 5. The proprietor of an heritage may burden it with a servitude, though another have the usufruct,
or

or even though the heritage were already subjected to another servitude.

But it is sufficiently plain of itself, that, by the establishment of a servitude, a person cannot prejudice the rights acquired by a third party, which were previously annexed to the heritage.

§ 9.

In like manner, a man cannot acquire a right of servitude,

1.) If he be not capable of disposing of his effects, and of making acquisitions. Consequently a right of servitude cannot be established in favour of a child, of a furious or fatuous person, &c. unless his guardian interpose his authority, and his curator give his consent.

2.) If he have not the property of a subject, in favour of which the real servitude (*servitus prædialis*) is established.

§ 10.

We shall show the object of personal servitudes, by treating of every personal servitude in particular, and the object of real servitudes, by explaining their nature.

§ 11.

The effect of a right of servitude is,

1.) To authorise a person by whom it is acquired, to use it according to the kind and nature of the servitude, and consequently to do every thing necessary, that he may exercise it conveniently.

2.) He is obliged, in the second place, not to make it more burdensome, and to do nothing which may prejudice the right of a third party, previously acquired on the heritage subject to the servitude.

3.) A third effect of the right of servitude is, that the person to whom it is due (*dominans*), acquires by the delivery of the servitude a real right.

4.) Which

4.) Which gives him a right to claim a servitude, by means of the real action called *confessoria*. In fine,

5.) He may even, before delivery, get the proprietor's demand dismissed, who wants to interrupt him from exercising his right of servitude, by objecting the exception of fraud or of covenant, (*exceptionem doli vel pacti*.)

But, on the other side, the laws grant to a person who denies that a servitude is due to another, the action called *negatoria*.

§ 12.

We shall treat of the methods of extinguishing rights of servitude, by explaining more particularly the nature of each servitude.

T I T L E III.

Of the personal servitude, which takes place by the constitution of an usufruct, or life-rent.

(*De usufructu*.)

§ 1.

THE first personal servitude is usufruct, or life-rent.

§ 2.

Usufruct is a personal servitude which gives us a right to use and enjoy a subject belonging to another.

§ 3.

Usufruct is either real (*verus usufructus*), of which we shall treat in this title; or supposed usufruct, (*quasi usufructus*), of which we shall treat in the following title.

§ 4.

§ 4.

Real usufruct takes place in things, of which the use may be separated from the substance, and which consequently can be enjoyed without destroying them.

§ 5.

This usufruct is established, in the first place,

1.) By the laws; for example, a father acquires the usufruct of the adventitious and ordinary peculiar of his children. Observe, on this head, that a person, who enters into a second marriage, preserves only the usufruct of the effects, which he had got by the death of his spouse. See the Frederician Code, part I. book II. title III. § 10. N. 1.

Real usufruct is established,

2.) In the second place, by the sentence of a judge in an act of division, (*judiciis divisiis*); judges being allowed, when a common subject or an hereditary estate cannot be conveniently divided, to adjudge, by his own powers, to the one the property, and to the other the usufruct. By this sentence, the one acquires the usufruct by law, (*ipso jure*), and without any delivery ensuing. It would be otherwise, if the usufruct itself had been contested, and had been adjudged to one of the claimants, who, in that case, could demand the usufruct only in virtue of the personal action resulting from the sentence, (*actione personali ex judicato*.)

3.) Real usufruct is established, in the third place, by an agreement with the proprietor of the heritage subjected to this right, or by a settlement by him, made in prospect of death. A dowery or jointure, for example, is an usufruct established by consent, (*usufructus consensu constitutus*.) See part I. book II. title IV. art. V. § 133.

In fine, a person may also,

4.) Get an usufruct by prescription in the way of usucapion, and by a possession of thirty years.

§ 6.

To establish a real usufruct, the laws,

I.) Require, in the first place, that the person who grants to another the usufruct of a subject, or heritage, be its proprietor, and that he have power to dispose of his estate.

When there are several proprietors of a subject or heritage, none of them can grant the usufruct of it without the consent of all concerned, excepting in the case where each has his share of the common subject separated and determined, and consequently the subject is not possessed jointly.

II.) The laws require, in the second place, that the proprietor of the subject or heritage subjected to the right of usufruct deliver it to the usufructuary or life-renter, because a real right (*jus in re*) is not acquired without delivery.

When then a right of usufruct on a moveable subject is established in favour of any one, it must be delivered to him, and, if it be on immoveable subjects, he must be put in possession of them; but it is sufficient, that that be done in the way of a fictitious delivery, (*per fictam traditionem*.) It is also reckoned delivery, when the proprietor, knowing that another enjoys a subject belonging to him, suffers it without complaint, (*sciente et patiente domino*.)

N. 1. When a man is appointed heir in an usufruct, the usufruct is not esteemed delivered (*pro tradito*), till the heir have really accepted of the inheritance, till he have taken possession of it, and till the usufruct have been delivered to the usufructuary or life-renter; but when an usufruct has been left in legacy to one, delivery is not necessary, because the legatary

gatory acquires, by law (*ipso jure*), a right or a real action.

N. 2. When an usufruct is only promised, and not delivered, the usufructuary has only a personal action against the proprietor, to oblige him to deliver the subject on which he had promised a right of usufruct.

III.) The laws require, in the third place, that the usufructuary give security. This shall be spoken of in title V.

IV.) In fine, the laws require also in a real usufruct, (*in vero usufructu*), that the use of the subject be separated from its substance; that is to say, that one may use it without consuming or destroying it, because the usufructuary cannot enjoy it unless he preserves the substance.

§ 7.

This usufruct may be constituted purely and simply, or conditionally, (*pure vel sub conditione*), as also for a certain term, or till a certain term (*ex die.*) The enjoyment may also be regulated in another manner; for example, that the usufructuary shall enjoy the subject alternately for a year, a month, and a day, and not for the year, the month, the day which follows, &c.

§ 8.

It has been questioned, when a testator, having left in legacy the usufruct of an heritage, has ordained, at the same time, in his will, that the legatary shall grant to his neighbour the right of going thither, (*jus eundi*), &c. whether he thereby intended to grant to the legatary the property of the heritage? The foundation of the doubt is, that nobody can constitute a servitude upon a subject, but its proprietor. Our will is, that, in this case, the legatary do not acquire the property of the heritage, but simply the usufruct,

under the condition of the servitude to be established (*sub conditione servitutis constituendæ*), because the servitude is established, not by the legatary, but by the testator and proprietor of the heritage.

N. 1. The same is the case, when the testator, after leaving the usufruct in legacy, ordains that the usufructuary, or life-renter, cannot alienate the subject. For the latter does not acquire the property by such a settlement, which is superfluous, the usufructuary having no right to alienate.

N. 2. When the power of alienating the subject is granted to the usufructuary, he is not, for that reason, declared its proprietor, and is but a simple usufructuary under a certain condition, (*usufructuarius conditionalis*), whose effect is, that the usufruct does not cease by his own death, but that it passes to his heirs, or to a singular successor, (*successorem singularem*). And in all other points the nature of the usufruct subsists.

§ 9.

All such as are capable of making acquisitions, may also acquire the usufruct of another's estate. Wherefore also cities, communities, and other corporations, are not excluded from doing so.

§ 10.

A father who has the usufruct of the ordinary adventitious peculiar (*in peculio adventitio ordinario*) of his children, continues to enjoy it after their death, but the usufruct ceases by the father's death; the right of enjoyment belongeth then to the children, who have the property, which is called consolidation.

§ 11.

When an usufruct has been constituted at the same time, in favour of several persons, each acquires it only proportionally, because the servitude of an usufruct may be divided. And this is also the reason, that, when
one

one of them happens to die, or otherwise to lose the usufruct, his portion does not accrue to the others, but returns to the proprietor. For we have abolished the law of accretion, (*jus accrescendi*), on account of the different interpretations and subtilties which it occasioned. See below, book VII.

§ 12.

Real usufruct may be constituted on all the subjects of commerce, that is to say, which belong to the trade of mankind, and which do not perish by use, whether moveable or immoveable, corporeal or incorporeal; consequently the usufruct of a hunting, of a jurisdiction, of a right of passage, &c. is valid.

A man may also grant the usufruct of a collection or universality of subjects, (*corporis vel universitatis*); for example, of a flock of sheep.

A person may likewise grant the usufruct of a statue, of a picture, of a medal, of a glass, or other vessel, &c. One may even establish an usufruct on all his effects, (*ususfructus omnium bonorum*), provided the legitim, which must necessarily be deducted from this usufruct, be reserved to the children and relations to whom it is due.

It is, moreover, evident, that out of the fruits must be taken wherewith to pay the debts before an usufructuary can come to the enjoyment: the reason of which is, that a person's estate is only what remains after his debts are paid, (*bona enim non intelliguntur nisi deducto ære alieno.*)

§ 13.

A person may grant the usufruct of a house, (*ususfructum ædium*), in which case the usufructuary may enjoy all the advantages and profits which can be drawn from the house, or on account of it.

Wherefore he may lodge there, not only with the family which he has at the time, but also with that
which

which he may have afterwards; he may also use all the apartments, even though he should have no need of them, exercise the right of brewing annexed to the house, enjoy the fields which are appendages to it, alienate his right of usufruct. See below, § 16. No. VI. &c.

N. 1. Thence it follows, that the usufruct or life-rent of a house (*ususfructus ædium*) differs from the use of a house, (*de usu ædium*), by which the user draws the same advantage from the house, but only for his daily wants. See title VIII. in which the effects of use are handled.

N. 2. The usufruct or life-rent of a house differs also from inhabitation, because, in this last servitude, one has only the use of a house in so far as he can draw any advantage from dwelling in it. See tit. IX.

§ 14.

Lawyers have greatly disputed whether an usufruct being granted to severals may be divided, and whether consequently each may enjoy it for his own share, (*pro parte*), or if each may enjoy it wholly, (*in solidum*.)

It is true, in general, that all servitudes, and consequently usufruct, are indivisible, (*individue*), and that each of the persons in whose favour a right of servitude is established possesses it wholly. But when the profit arising from a servitude can be divided, servitudes themselves are divisible (*dividue*) in that respect, in so far as a division can be made.

Usufruct being then conveniently divisible as to the advantages arising from it, it follows, that when it has been granted to two persons on one and the same heritage, the right of usufruct is wholly acquired to both, but that each has the enjoyment only for his share, and consequently a division of it may be legally demanded, (*per judicia divisoria*.)

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It is otherwise when the enjoyment cannot be divided, as happens in the servitude of use, (*in servitute usus*), for by this servitude the user acquires only what he can consume for his daily necessities. If then the use, or daily necessities, have been granted to two persons, a division cannot be made between them, because neither would have what is necessary for his daily wants. Thence it follows, that the servitude of use is always indivisible; by which is understood, that every user may in fact claim wholly what is necessary for his daily wants. It is the same in real servitudes; and this is the reason also, that when the right of passage (*iter*) is given to severals, each may require it wholly (*in solidum*); for it is not possible that this right can be exercised in part.

§ 15.

An usufruct cannot be constituted on effects which the proprietor is obliged to restore immediately; for example, on feoffments in trust, &c.

§ 16.

The following are the effects of an usufruct legally constituted,

I.) The usufructuary or liferenter acquires the full and entire enjoyment of all the kinds of fruits, revenues, conveniencies, and customs, which may be drawn from the subject, or on its account: he is also at freedom not to use the thing but for his own pleasure, provided it be not thereby wasted.

II.) He enjoys in particular all kinds of fruits, whether natural or acquired by ingenuity or industry. Among fruits are reckoned metals, which may be found in the heritage, when the proprietor is invested in them, and when the metals grow again; which would take place even though the discovery of them were made only after the establishment of the usufruct.

III.) An

III.) An usufructuary acquires, in the third place, all the civil rights, such as rents of houses or farms, interests, tithes, redeemable rents, yearly rents, dues of alienation, (*laudemia*), fruits of jurisdiction, (*fructus jurisdictionis*), incomes of huntings, of tolls or customs, and other rights belonging to the heritage of which he has the usufruct.

IV.) An usufructuary acquires also all the advantages flowing from the accessions; for example, from accretions that have happened to the heritage or subject by way of alluvion, &c. But,

V.) He can pretend no claim to treasure found in the grounds, which is acquired to the proprietor. If the usufructuary himself had found it, he would have a right to demand the portion which the laws allow to a person who has found a treasure, (*portio inventoris*.)

VI.) Besides that an usufructuary may dispose, and do in the heritage whatever is necessary for his enjoyment of it; whence it follows, that he may build a barn on it for laying up the fruits, dig ditches, make ponds, &c,

But he has not a liberty to build a house, or to finish one which is imperfect, or to make alterations on what is finished.

He may also sell his right, give it up, mortgage it, &c.; but when once his usufruct is extinguished, all the rights which he has transferred to others cease also by that extinction.

VII.) In fine, he acquires a real right, (*jus in re*), and consequently a real action, which is named *confessoria*, by which he may redemand his right of usufruct from any possessor, and even from the proprietor.

He has also all the actions arising from such a real right; for example, the action of robbery, that which is given to such as possess any subject without division, or in common, in order to get it divided, and that

that which regards the limits of heritages, (*communi dividundo, finium regundorum*) interdicts, (*interdicta*), &c.

§ 17.

By the Roman laws an usufructuary did not acquire by law all the advantages and conveniencies just mentioned, he obtained them only by enjoyment, (*facto perceptionis*), in so far as he himself had received the fruits, or had caused them to be gathered and laid up for him by others.

The effect of that decision was,

1.) That when a third party had gathered or laid up the fruits, or when they had been separated by any accident, for example, by a storm of wind, or when they had been separated of themselves, as happens with respect to lambs; in all these cases the fruits did not belong to the usufructuary, while he had not put them under his own keeping. He had only a personal action against the proprietor to oblige him to give up his right of suing, or else to redemand the fruits from the person who had taken possession of them, that they might be restored to him.

2.) That when an usufructuary happened to die when the fruits were still hanging and growing on the grounds, his heirs could not claim them, even though they were ripe; the reason of which was, that the defunct not having received them, neither could his heirs receive them, the defunct's right of enjoyment being extinguished by his death.

But considering that the first effect of that decision is at bottom but a subtilty of the Roman law, and that the second is not founded on equity, as the heirs who have cultivated the ground, and have possessed it the greatest part of the year, ought not to be deprived of the fruits, and entirely excluded from the harvest. We ordain;

1.) That, in the first case, the usufructuary shall

VOL. II.

N

have

have a real action, and consequently that he may re-demand from any possessor the fruits separated, whether by a third party, or by an accident, or by nature. And,

2.) In the second case, that the usufructuary's heirs shall be admitted, in some measure, to the participation of the growing fruits. This shall be treated more at large below in § 19. a.

§ 18.

An usufructuary is obliged on his side,

I.) Agreeably to the security which he ought to give, to enjoy the subject like a good husband or œconomist, and to preserve its substance. For this purpose he is obliged to replace by his lambs the ewes or wedders which are wanting in the flock; to plant new trees in place of such as are decayed, but not of such as have been trodden down by accidents; to labour the ground well; to maintain the vineyards; to preserve the houses and other buildings, and to repair them if necessary.

II.) He is obliged for a slight fault, (*præstat culpam levem*); that is to say, he is obliged to take the same care of the subject or ground as a good œconomist takes of what belongs to himself. If then, by his fault or neglect, any thing be lost in the subject, or if loss or prejudice to its rights be occasioned; for example, if neglecting to exercise a right of servitude it happen to be lost by prescription, he must pay its value to the proprietor.

1.) An usufructuary having the full enjoyment of the effects, is obliged to pay all the burdens due upon them, or which ought to be paid on their account, whether they have existed before, or have been imposed afterward; for example, contributions ordinary or extraordinary; but not such as the proprietor of the ground has neglected to pay, which may be demanded from

from the possessor of the ground, reserving however recourse to him against the proprietor.

An usufructuary ought also to pay,

- 2.) The tythes.
- 3.) Irredeemable rents.
- 4.) Servants wages.
- 5.) What is paid for the service or lodging of the military.

6.) Expenses of law-suits occasioned solely by the usufruct. But if the question be also concerning the proprietor's right, for example, if one claim the property of the whole subject, or only of a part, the proprietor is obliged to bear all the expenses of the law-suit, though the usufructuary profit by it.

7.) An usufructuary or liferenter of all the effects (*omnium bonorum*) is obliged to pay the debts secured on the subject; for by effects is meant only what remains after the debts are deducted. See above, § 12.

§ 19.

An usufruct or liferent ending by the death of the usufructuary or liferenter, does not fall to his heirs: but as it is just that his heirs should share in the fruits of the last year, in proportion to the time of the year that he lived, our will is, that what follows be observed with regard to that matter.

If the usufructuary die before the twenty-fifth of July, his heirs can demand from the proprietor only what has been expended to put the grounds in a condition to produce.

But if he die after the twenty-fifth of July, the enjoyment of the whole year shall belong to them: if then the usufruct were set in lease, they shall draw the whole rent.

When an usufructuary has laid out necessary expenses, his heirs may retain the subject till they be reimbursed of them, (*jure retentionis*); and with re-

gard to the expenses, what has been regulated with respect to a *bona fide* possessor shall be observed.

§ 20.

A proprietor can do nothing to hinder an usufructuary from the full enjoyment of a subject of which he has the usufruct; he is, on the contrary, obliged to allow every thing necessary to put him in a condition to exercise his right, and to remove all obstacles that may be opposed to his enjoyment.

N. 1. Neither the proprietor nor his heir can then interrupt the passage leading to the subject on which the usufruct is settled, if he cannot have access to it otherwise; and if the testator having given the subject in legacy, had discharged that passage to be allowed to the usufructuary, that prohibition would be ineffectual.

N. 2. It is the same with respect to all other things or aids, (*adminiculis*), without which one cannot use his right; and therefore all emoluments, advantages, servitudes, for example, those which are called *via*, *iter*, *aqua*, are included in an usufruct, so far as they are absolutely necessary for the exercise of that right.

N. 3. If then a testator had two subjects or heritages, and if having given to Caius the property of the one, and to Seius the usufruct of the other, this last could not come at the subject of which he has the enjoyment without passing through Caius's grounds, the heir would be obliged to procure him a passage, and he might retain Caius's subject till he had granted Seius a right to pass through it: but the case would be altered, if Seius could have access to his subject by another road, though longer.

N. 4. When also a testator leaves two houses, and gives the usufruct of the one to Caius, the heir and possessor of the other house cannot by building entirely stop the light of the house on which the usufruct

fruct is constituted, but he may make buildings to deprive it of a part of the light, because a house cannot be possessed which has no light, but the usufruct of a house may subsist and take place though the apartments be a little dark.

N. 5. Moreover, the proprietor cannot be hindered from alienating or mortgaging, even without the usufructuary's consent, the subject on which the usufruct is granted, provided always that the right of usufruct remain entire, and that the usufructuary's condition be not thereby endamaged. The proprietor then cannot give a right of servitude to the prejudice of the usufruct, unless the usufructuary consent and renounce his right in so far as the servitude may be hurtful to it.

§ 21.

The actions allowed by the laws to an usufructuary shall be treated of in title X. following.

§ 22.

An usufruct expires, and comes to an end,

1.) By the death of the usufructuary, though the enjoyment have been granted to him till a certain day, (*sub die*), or under a certain condition, and though neither the day nor the condition have happened. It ends also by the death of the usufructuary, though he have alienated his right.

When an usufruct has been granted to a person and his heirs, the heirs only of the first degree succeed to the right of usufruct. They do not succeed even as heirs, but by virtue of the proprietor's settlement, (*ex concessione domini*.)

An usufruct settled in favour of a body or community, ends when the body or community itself comes to an end; for example, if the community or society happen to be dissolved; or else it elapses after the term of one hundred years, which is the longest age

age of man. But an usufruct does not fall by the proprietor's death.

2.) An usufruct constituted for a certain time falls, when that time is elapsed.

3.) An usufruct falls, in the third place, when the usufructuary happens to be proscribed, or when his goods are confiscated.

4.) When an usufructuary does not enjoy the subject like a good œconomist.

5.) When he does not use his right, either by himself or by others, during the space of thirty years. See above, book III. title V. art. II. § 36.

Observe also, that if the proprietor of a subject object to the usufructuary's enjoyment, and prohibit it; and, if the latter acquiesce in the prohibition for ten years, when parties are present, and twenty years when absent, he loses his enjoyment by the right of usucapion. See above, book III. title V. art. I. § 26. N. 3. and 4.

6.) An usufruct falls, when all the thing or subject on which the usufruct is given, happens to perish, as also when the subject is possessed by the enemy, reserving nevertheless the right of reversion (*jure postliminii*.) See above, book II. title V. art. VI. § 36.

Item 7.) When the thing or subject is so changed in its form, in its figure, in its name, and in its species, (*specie*), that it cannot return to its first species. See above, book II. title V. art. II. § 8. &c.

Also, 8.) When the question is concerning an usufruct given by one who has only a revocable right of property, (*revocabile dominium*), the constituent's right happens to fall. See above, book III. title IV. § 4.

Also, 9.) When the usufructuary becomes the proprietor's heir, or the proprietor succeeds to the usufructuary's effects.

Likewise, 10.) When an usufructuary yields his right to the proprietor, but it does not end by the usufructuary's

usufructuary's cession of his right to a third person. But he may alienate and yield his enjoyment to another, and the cessionary obtains no more right than the usufructuary had.

§ 23.

On the falling of an usufruct it returns by law to the proprietor, and the usufructuary is obliged to restore to him the thing or subject, with all its consequences and dependencies, including the fruits not received. See above, § 18. And, as to the meliorations, wastes, and casualties, he shall observe what has been ordained with respect to a fair (*bona fide*) possessor.

§ 24.

The proprietor may, on the falling of the usufruct, redemand the thing or subject; and if the usufructuary have given surety, he may claim the thing or subject, by virtue of an action of covenant, (*actio ex pacto*); but if they give no security, he may raise the action called *condictio sine causa*.

T I T L E IV.

Of the usufruct of things which perish, and are consumed by use.

(*De quasi usufructu.*)

§ 1.

THE nature of real usufruct (*veri ususfructus*) consists in enjoying things so that they remain entire, (*salva substantia*), as the use of them may be separated from the substance. See part II. book IV. tit. III. § 4.

But as there are several things which perish by use, so that, after the expiration of the usufruct, there remains

mains nothing to be restored to the proprietor, the laws have regulated, that, in this case, the usufructuary should be bound, either to restore another thing like in kind, in quality, and in quantity, or to pay its value. Wherefore they have called this enjoyment a supposed usufruct.

§ 2.

A supposed usufruct is settled,

1.) By law; for example, in the ordinary adventitious peculiar, &c. (*in peculio adventitio ordinario*.) See the preceding title, § 5.

2.) The supposed usufruct is constituted, in the second place, by a settlement of the proprietor, when by an agreement, or by a testamentary deed, he grants to any one the usufruct of a thing which is consumed by use; in which case the supposed usufruct begins in the same way as the real. See the preceding title, § 5.

3.) The supposed usufruct is acquired by usucapion, or by a prescription of thirty years. See the preceding title, § 5.

But, 4.) The judge cannot, by virtue of his office, adjudge it in acts of division, (*in judiciis divisoriiis*); for he has not the power of allotting to one the property, and to another the usufruct, except with respect to things of which the enjoyment may be conveniently separated from the substance, which cannot take place with regard to things which perish by use, which are the object of the supposed usufruct.

§ 3.

Things which are the object of the supposed usufruct being of a nature to be consumed by the use made of them, and the usufructuary being obliged, when the usufruct falls, to restore the like or their value, the laws have ordered that he be bound to give security, on that head, and this security comes
instead

instead of property. Its effects shall be spoken of in title V.

§ 4.

All such as can constitute a real usufruct, may also establish a supposed one, and, in the same manner, all such as are capable of acquiring a real usufruct, may also acquire a supposed one.

§ 5.

A supposed usufruct is constituted in things which are consumed by use, and which consequently cannot be restored after having enjoyed them: such is, for example, the usufruct of a hogsheaf of wine, of a bushel of corn, of a barrel of oil, of a pack of wool, of a sum of money, &c. In such cases the proprietor, to prevent any future difference, will act prudently, if he cause the value of the thing in money to be regulated, which the usufructuary is to restore when his usufruct is expired.

§ 6.

The enjoyment of a coat given by the proprietor to any one, cannot then be reckoned a supposed usufruct, because the use of the coat may be separated from the substance.

But as the coat, by long use, turns to rags, it is proper for the proprietor to get it estimated, and a certain value determined, which the usufructuary shall be obliged to pay after the expiration of the usufruct; this must also be observed in things which perish entirely by use, (*rebus mere fungibilibus.*)

§ 7.

A supposed usufructuary acquires, after delivery, the property of the thing, and the security which he is obliged to give comes in place of property to the proprietor; whence it follows that the supposed usufructuary may alienate the thing, consume and dispose

of it at pleasure. And, if it happen to perish, he alone is liable in the penalty.

§ 8.

If the proprietor delay to deliver the usufruct left in legacy or promised, the supposed usufructuary may raise against him an action on the will or covenant, (*actionem ex testamento vel ex pacto*); or, if the usufruct have been allotted by the judge, he may claim his assistance, (*implorare officium judicis*). And all these methods tend to oblige the proprietor to deliver to the supposed usufructuary the things of which he has the usufruct.

When the delivery is made, and the supposed usufructuary has thereby acquired the property, for example, of the wine, of the oil, &c. of which he has the enjoyment (see § 7.), he acquires all the actions competent to the proprietor.

When the usufructuary, after delivery, denies, for example, that the wine was left him in legacy, or given by a right of usufruct, the proprietor may redemand his right by the action called *confessoria*, which shall be treated of in title X.

§ 9.

This supposed usufruct expires and ends, 1.) By the death of the usufructuary; 2.) By his proscription, and the confiscation of his effects; 3.) When he becomes the proprietor's heir, or the latter succeeds to the usufructuary's effects. Also, 4.) When an usufruct being granted for a certain time, that time is elapsed. Also, 5.) When the rights of the usufructuary and proprietor come to be confounded in the same person, which is called consolidation. Also, 6.) By usucapion and prescription in the space of time required, but not by a cession made to a third party. See § 23. in the end.

§ 10.

§ 10.

At the expiration of the supposed usufruct, the usufructuary is bound to restore a thing like in kind, in quality, and in quantity, or else its value. For this purpose, the proprietor has an action of covenant, (*actionem ex pacto*), if the usufructuary have given security; and if he have given none, he has the action called *condictio sine causa*; but he has not a claim of right.

§ 11.

A loan is indeed an agreement by which a creditor delivers also to a debtor some of those kinds of things, which are given by number, by weight, or by measure, (*rem fungibilem*), on condition that he shall restore as much of the same kind, and of a like quality. Nevertheless, the supposed usufruct differs from it; 1.) In this, that an usufruct was usually gratuitous, and in a loan interest must be paid; 2.) Because, in a loan, the debtor is not necessarily obliged to give security; and, 3.) In this, that the debtor has not the action called *confessoria*, nor any other real action, but only a personal action.

T I T L E V.

In what manner an usufructuary is to give security, and what sort of security he is to give.

(*Usufructuarius quemadmodum caveat.*)

§ 1.

AS the essence of an usufruct consists in this, that the usufructuary is obliged to restore to the proprietor, after the expiration of the usufruct, either the thing in kind, or a thing of the same kind, in quality,

and in quantity, or its value, the laws have ordained, that both the real usufructuary, and the supposed usufructuary, shall be obliged to give security.

§ 2.

The security which the usufructuary is to give, with respect to a real usufruct, is, 1.) To enjoy the thing like a good œconomist, and preserve its substance; 2.) To restore it after his usufruct is expired, in the same condition as he received it.

§ 3.

A person who has only a supposed usufruct, ought only to give security to restore a thing like in kind, in quality, and in quantity, or its value.

A man cannot then give security with regard to a supposed usufruct, that he shall use it like a good œconomist, because the supposed usufructuary becomes real proprietor of the thing, and consequently has power to spend it.

But he is obliged to give security that he will restore a thing like in kind, in quality and in quantity, or its value; and in this the essence of a supposed usufruct consists.

§ 4.

All kind of usufructuaries, whether they have the usufruct by virtue of a law, of a sentence of a judge, or by an agreement, are obliged to give security. This security ought also to be given, whether the usufruct be left by legacy, or constituted on a subject, moveable or immoveable, or common.

It is likewise necessary, a) Though the usufructuary be a notoriously rich man, unless he have a land-estate; b) Though the usufructuary have got in legacy the enjoyment of what he owes himself; c) Though the usufructuary be a near relation, unless he be the father; see below, § 11.; d) Though,
after

after having granted purely and simply the usufruct, the property be secured to the usufructuary by the same settlement, but under a certain condition, because it is uncertain whether the condition shall exist; but, if the property were left in legacy to the usufructuary, to fall to him at a set day, he would not be obliged to give security, because it would be giving it to himself.

When there are several usufructuaries, each must give security proportionally to his share.

§ 5.

This security is to be given to the proprietor, and if there be severals, it ought to be given to each proportionally to his right.

When the proprietor of a subject gives in legacy, or grants the property to Caius, and the usufruct to Mævius, Caius is indeed usufructuary for a part, but he is sole proprietor of the subject, and consequently Mævius is obliged for his share to give him security.

When the usufruct is left in legacy to Caius, on condition that he shall restore it to Mævius, Caius is not obliged to give security, but to the heir who is proprietor of the subject; but when the subject shall be delivered to Mævius, he shall be obliged to give security to Caius, and Caius shall give it to the heir.

When the usufruct is left in legacy to Caius, and the property to Mævius, with this restriction, nevertheless, that the property shall not fall to Mævius, till after the expiration of the usufruct; in this case, Caius shall give security to the heir, and not to Mævius.

§ 6.

When an usufructuary delays to give his security, or when that which he gives is not sufficient, he cannot attain the enjoyment till the point of the security be regulated; and the proprietor is not obliged to
restore

restore the fruits which he shall receive during all the time of the usufructuary's delay.

§ 7.

The security ought to consist either in pledges or in sureties; and if the usufructuary give oath that he cannot furnish either, it shall be the judge's business to use his discretion in the choice of the most proper methods to provide for the security of the proprietor of the subject, and to examine whether the subject or heritage ought to be sequestered, and given to some person to be administered; or if it ought to be farmed for rent; or if the usufructuary may be admitted to give the security of his own oath: but in this last case the judge ought previously to make the necessary inquiries, in order to be satisfied that the usufructuary is a good œconomist, and of an unblemished character.

When the usufructuary cannot give the requisite securities, the administration may be left to the heirs; in which case the heir is bound to give security to the usufructuary, that he will render him a faithful account of the fruits, and deliver them to him exactly: a certain salary ought to be fixed for the sequestrator or administrator, and the rest of the fruits delivered to the usufructuary.

§ 8.

As to the effect of the security, a distinction must be made between a real and a supposed usufructuary. It has been said above, that a real usufructuary is obliged to give security with regard to two articles, 1.) That he shall use the subject like a good œconomist. 2.) That he shall restore it after the expiration of his usufruct.

The effect of security as to the first article is,

1.) That the proprietor may, in case the usufructuary do not use the thing as a good œconomist, either demand his indemnification, or, according to circumstances,

circumstances, revoke the usufruct: but to produce this last effect, it is requisite, a) That the thing be wasted; b) By the fraud or slight fault (*dolo vel culpa levi*) of the usufructuary; and, c) That this loss be considerable. Thence it follows, that the proprietor may sue, in virtue of this security, the usufructuary, whensoever he occasions the damage which happens to the subject.

To prevent long discussions with respect to the proof of the damage, the proprietor will do well exactly to describe the subject, and the condition in which he delivers it to the usufructuary: it is not necessary however to observe in this the forms requisite in entering upon an inheritance, and it is sufficient that an inventory be made with the consent of both parties.

When no inventory has been made, or when an inventory has been made by one of the parties without the participation of the other, the proprietor is obliged to prove both the deterioration of the subject, and the nature of the damage, occasioned by the usufructuary. And it is not sufficient to prove this that the proprietor furnish a particular inventory upon oath, for he ought to impute to himself the fault of not having, on delivery of the subject, caused it to be described in the manner mentioned.

When a mother or a widow (but not a father, who is dispensed from making an inventory) acquires an usufruct, and is put in possession of it, it is not the proprietor's business, but that of the mother or widow, to draw up such an inventory; failing which the proprietors may be allowed their oath *in litem*.

When a mother or a widow dissipates the moveable subject, or lets the immoveable go to waste, the judge may, if he think proper, take from her the administration, even though she should offer to give security. And when the father himself begins to dissipate or squander the subject, he may be obliged
to

to cause an inventory to be made, and to give security.

II.) The effect of the security which the real usufructuary gives, is, in the second place, that the proprietor may demand his indemnification, by virtue of an action of covenant, (*actione ex pacto*), when the first has given security, and by an action *in factum*, or by an action on the law *Aquila*, when he has not given security.

Security may be omitted, but not remitted; whence it follows, that the proprietor of a subject who has delivered it without requiring security, or who has even renounced security, may nevertheless still demand it at any time; because, by remitting the security to the usufructuary, he would get a liberty of squandering a subject belonging to another, which would be contrary to good manners.

When the usufructuary happens to die without having given such security, he is by law reckoned to have given it.

§ 9.

The effect of the real usufructuary's security, as to the second article, is,

1.) That he is obliged, at the expiration of his usufruct, to restore the subject in the manner which the deed of security given by him bears.

2.) That the proprietor may demand restitution of the subject, on an action *ex pacto*, when security has been given, and by means of the action called *condictio sine causa*, when security has not been given. Besides, the proprietor is always at liberty to redemand the subject from any possessor.

This security may not only be omitted, but may also be remitted; whence it follows, that an usufructuary, when once the subject is delivered to him without this security, acquires immediately all the fruits and real rights of the subject.

But

But if, after the security has been remitted to him, the usufructuary begin to use the subject like a bad œconomist, security may be required of him, or application may be made to the judge, to get the proper limitations prescribed to him, which he is to observe in the use of the subject.

§ 10.

With regard to the security which the supposed usufructuary is to give, its effect consists not in causing him to restore the same thing, but one like in kind, in quality, and in quantity, or to pay its value.

Wherefore a proprietor has no claim of right, for he can redemand neither a kind nor a quantity, but has simply a personal action, namely, the action *ex pacto*, if security has been given, or the action called *condictio sine causa*, when no security is given.

§ 11.

This security is not required,

1.) When an usufruct is granted to a father, either by the law or in any other way.

2.) When the property itself is to return to the usufructuary after a certain time, by virtue of a legacy, or of an agreement, because he would be giving security to himself: the case would be otherwise if the time when he is to acquire the property were uncertain, or if it were granted to him only conditionally.

3.) When the usufruct is given to the public, no security is required.

4.) Neither is any required from a man, who having given his fortune to another in whole or in part, has reserved to himself the usufruct.

5.) When, with respect to the real usufruct, the proprietor of the usufruct has renounced security for restoring the subject after the expiration of the usufruct, but not when the proprietor discharges the usufructuary from the security which obliges him to

use the subject like a good œconomist. See § 8. at the end.

Observe, with respect to the security to be given by the supposed usufructuary, that the proprietor cannot renounce it, because it is to him in place of a property. See above, § 3.

T I T L E VI.

Of the time in which a person is intitled to use his right of usufruct.

(Quando dies ususfructus cedat.)

§ 1.

IT is evident in law, that when a testator has purely (*pure*) given a thing in legacy to any person, the legacy is due from the day of the testator's death, and that it is transferred by law to the legatee, so that even though the legatee should die before entering upon, or seisure of the inheritance, the legacy would nevertheless be transmitted to the heirs of the legatee.

It is also known in law, that when a legacy is given under a certain condition, or is not to take place till after a certain day, (*sub conditione vel ex die*), the legatary acquires a right immediately after the testator's death, and transmits it to his heirs, though he cannot demand the legacy till the day be come, or the condition exist.

These two rules admit an exception in a legacy of an usufruct: for when the legacy is made purely, the usufructuary acquires his right, not reckoning from the day of the testator's death, but from the day of the heir's accepting of the inheritance.

When a testator has left a legacy to any one under

der a condition, or has ordered that the legacy should not take place till after a certain day, (*sub conditione vel ex die*), the legatary's right does not begin till the day be come, or the condition exist; if then the legatary happen to die before, the legacy is null.

The reason of this has been shown in title III. § 17. It is, that the usufructuary has no right but by the deed of receiving, (*ex facto perceptionis*), that is to say, he has no right but by actual enjoyment; for an usufruct is annexed to the person, and expires with the person. Now, an usufructuary cannot obtain the enjoyment till the heir accepts the inheritance, and puts him in possession of the subject that he may exercise his right; or if the legacy be conditional, or be not to take place till after a certain day, the usufructuary cannot enjoy till the condition and the day happen: for if an usufructuary had any right before being admitted to the enjoyment, he might transmit his right to his heirs before the existence of the day, or of the condition, which is contrary to the nature of an usufruct.

§ 2.

For the same reason an usufructuary's right established by an agreement, when it is not to take place till after a certain day, or is conditional, likewise does not begin till the day and the condition happen, which is peculiar to an usufruct: without this, if an usufructuary began to have any right from the time that the agreement was made, and he happened to die before the existence of the day or of the condition, the usufructuary's real right, contrary to its nature, would be transmitted to his heirs.

§ 3.

If an usufruct be established on the footing of so much a-week, a-month, a-year, for example, on the footing of ten rix-dollars a-month, of a hundred a-

year, &c. these are as many legacies as there are weeks, months, years, and the usufruct does not begin till the week, the month, or the year be begun. This is the reason that the enjoyment cannot be demanded all at once, but only by the week, &c.; and if the usufruct of a week, of a month, of a year, be prescribed, that of the other weeks, &c. is not also for that reason prescribed.

T I T L E VII.

Of the actions granted by the laws to a man who affirms that an usufruct is established in his favour, as well as to him who denies that he is obliged to allow his subject to be liable to such a servitude.

AS the actions arising from personal servitudes agree in most things with the actions allowed by the laws to real servitudes, or such as are established to the advantage of heritages, (*servitutibus prædialibus*), we shall treat below of the two kinds of servitudes in a particular title. See title XI. following.

T I T L E VIII.

Of the second personal servitude, by which the use of a thing or subject is given to one for his daily necessities.

(*De servitute usus.*)

§ I.

AMong personal servitudes, in the second place, is reckoned use, (*servitus usus*), which takes place when

when the enjoyment of a thing is given to a person for his daily support.

§ 2.

Use is then a servitude or real right, authorising a man to enjoy for his daily necessities a thing belonging to another, in such manner, that the substance may remain entire.

Use differs from usufruct, 1.) Because the usufructuary has a right not only to enjoy the subject for his daily necessities, but also the profit generally of all the fruits and incomes which the thing, the lands, or the house subject to it can produce; and, 2.) From inhabitation in this, that a man who has this last servitude has his enjoyment limited to the use that one can make of a house by inhabiting it, and that he has not the other advantages which may be made of it in any other way. See below, title IX.

§ 3.

Use is either real or supposed, (*vel verus vel quasi usus.*) Real use is that which consists in using a thing so that it remain entire; supposed use is that which takes place with respect to things which are consumed by the use which is made of them.

§ 4.

Use is established by the same method as usufruct; and therefore the user is obliged, when he is in possession of a thing, to give the same security as the usufructuary. It must be observed on this head, that use ought to be regulated according to the quality and station of the persons: therefore it is not sufficient to regulate it with regard to the user's family, but the number of the servants necessary for him must also be considered. If the user marry afterward, or being married, procreate children, the judge must regulate how much the use ought to be augmented in proportion, unless they have agreed on the contrary, or on

a certain sum which was to come in place of the use.

If the user receive at his table strangers, relations, or other persons, the use cannot be extended on their account.

§ 5.

An use may be established with respect to every thing on which an usufruct can be constituted.

§ 6.

The effect of this servitude consists in procuring to the user all the fruits and advantages which he can draw from the subject for his daily wants, even though he be in easy circumstances, or though another have already given him a like use.

If then a man have got the use of a flock of sheep, he is reduced to the milk which he wants daily, and to the dung necessary for improving his grounds; but he has no right to appropriate to himself the wool, or the lambs, or the skins of the sheep that die.

When one has got the use of a yoke of oxen, the user may not only employ them in tillage, but also in performing other carriages so far as he wants them daily.

When the use is of a garden, the user may take out of it all that he wants for his daily necessity, and gather as much fruit as he can consume in his family during the winter, but he cannot sell any; neither has he a right to gather the leaves, for example, of the mulberry-tree.

If it be a whole estate, he may appropriate to himself all the fruits and advantages that can be drawn from it, so far as he wants them in his family, as rye, wheat, &c. straw, hay, wood, &c.

And if it be the use of a house, the user may likewise enjoy all the profits that may be drawn from it; for example, if it be a right to brew, he may brew for his own family; if it have meadows belonging to it,
and

and the proprietor have kept cattle, the user may also demand hay for his.

All the other advantages which are not necessary for the user's daily necessities, remain to the proprietor; and when there is any difference concerning the use, the judge is charged to determine it.

§ 7.

The user has all the actions which the laws have allowed to an usufructuary. See below, title XI.

§ 8.

An user cannot yield his right to another, for it cannot be said that an user who should yield his right wanted a thing which he would consent to allow a third party to enjoy.

§ 9.

When an user cannot naturally draw any advantage from a thing, it is allowable for him to hire it; for example, a) When a carrier has been allowed the use of a set of horses, knowing that he exercises the trade of a carrier, he may hire them, and employ the hire for his daily necessities. b) When a legacy has been left to a man ignorant of the learned languages, of the use of a Latin library, the user has a right to hire it to a man of learning for a fee. c) When one has got the use of a wood too remote for his drawing any advantage from it, it is allowable for him to cause some trees to be cut down, to sell them, and to employ the money received for them to buy the quantity of wood which he wants in his family. d) When one has got a legacy of the use, for example, of the sum of a thousand rix-dollars, he may lay it out at interest. e) When a man who is no trader has got the use of a warehouse or shop, he may let them, &c.

§ 10.

Use cannot be divided with another; for the user,
if

if he divided it, would not have sufficient to support his daily necessities.

§ 11.

When any one has got the use of a house left him in legacy, or settled upon him, he is at liberty to take into the house an honest lodger to inhabit it with him; because such a measure occasions no loss to the proprietor, and is advantageous to the user.

§ 12.

Use comes to an end in the same manner as usufruct. It shall be treated of below, in title XII.

T I T L E IX.

Of the third personal servitude, which consists in inhabitation.

(De servitute habitationis.)

§ 1.

THE third personal servitude is inhabitation, which consists not in the usufruct, nor in the use of a house belonging to another, but in the right of dwelling in it. See above, title III. § 13.

§ 2.

Inhabitation is established in the same manner as use and usufruct.

§ 3.

The right of inhabitation is either extended to the whole house, or else it is limited to an apartment, a cellar, a barn, a tower, &c. in which case those to whom the inhabitation is given, have only the right of inhabiting the part of the house which is allotted for them.

§ 4.

§ 4.

This servitude takes place, even though the person to whom the right of inhabitation is granted have already a house of his own, or though another have already given him a dwelling.

§ 5.

The effect of this servitude consists in the right which he who has the inhabitation acquires of dwelling in a house, in a cellar, &c. belonging to another. Moreover, there is no doubt but this right is extended to all his family present and future, and to all the servants which he needs, supposing the number of persons whom he may take into the house be not regulated and determined by his title-deed.

A man who has the inhabitation does not enjoy all the other advantages which may be drawn from the house, (which remain the proprietor's); so that he cannot cause the meadows belonging to it to be mowed, nor exercise the right of brewing annexed to it, &c.

§ 6.

A person whose right of inhabitation is limited to a room, cannot use the dressing-room belonging to it.

§ 7.

He cannot lend or yield the inhabitation to another, but he must use it himself, which happens also when he lets his house. In this case, if he happen to die during the lease, his heirs may demand the rent of it proportionally to the time that he has lived.

It is, moreover, plain, that the lease cannot extend beyond the inhabitation; whence it follows, that he cannot let the granary to put grain in it, nor the cellar to put wines in it.

§ 8.

Neither a person who has the inhabitation, nor his
 VOL. II. Q lodger

lodger can make any alteration in the house, nor make new buildings, nor enlarge the apartments, &c. nor make partitions in them, &c. even though the house could be meliorated thereby; but one who has the inhabitation is obliged to restore the house, the apartment, &c. in the same condition that he received it.

But it is allowable for him to do in it any of those things which without altering the house serve to embellish it. He may then cause the house to be painted or whitened, pave the rooms with marble, wainscot and plaister the apartments.

§ 9.

1.) A person who has the inhabitation, being obliged to restore the house in the same condition that he received it, it follows, that he is obliged to preserve it in good condition, to support it at his own expense, to repair the windows, the roofs, the chimneys, &c.; which keeping in repair, extends to the gardens and summer-houses in them.

2.) He is answerable, in the second place, like the usufructuary, for his fraud and the slight faults committed by him, (*præstat dolum et levem culpam.*) Wherefore, if any damage happen to the house, or to the apartments by his own fault, or by that of his wife, of his children, of his servants, and of his lodger, he shall be answerable for it, even though he should incline to renounce his right to it for the future; but he is not bound for the damage occasioned by a third party. See above, title III. § 18.

3.) He is bound, in the third place, to pay the burdens which are paid for inhabitation; for example, what is called *service*. In case he have the inhabitation only of some rooms, he shall not bear these burdens but in proportion to what he enjoys.

If

If it be necessary to cause the street to be paved before the house, that burden falls on the proprietor.

§ 10.

The right of inhabitation cannot be transmitted to heirs; they have only a right of retention (*jus retentionis*) for the necessary expenses laid out by the defunct; and if, without deducting them, they have redelivered the immovable subject, they may sue for them in the action called *condictio indebiti*, or by the action *negotiorum gestorum*.

§ 11.

The proprietor can make no alteration in the house as long as the person's right continues who has the inhabitation.

Neither can he lodge in it a man to inspect it.

§ 12.

A man who has a right of inhabitation, has all the actions which the law allows to an usufructuary.

He may then when this right has been promised to him, and the proprietor delays to put him in possession, raise a personal action against the proprietor for delivery, and for indemnification of all the loss occasioned by this delay.

But after the delivery is made to him, he has the action called *confessoria*, &c.

The right of inhabitation falls in the same way as the usufruct and use of a house; it ends then also by prescription, and by not using, (*non usum*.)

T I T L E X.

Of real servitudes.

(De servitutibus prædiorum.)

§ 1.

WE have hitherto explained the nature of personal servitudes; we are now to treat of real servitudes, or such as are established for the advantage of lands or heritages.

§ 2.

It must, in the first place, be observed, that by city-heritages are understood houses and other buildings, and by country-heritages grounds and land-estates. For no attention is paid to the place where the lands or heritages are situated, but to the use made of them. And this is also the reason that among city-heritages are reckoned barns situated in the country, and pleasure-gardens.

§ 3.

A real servitude is that which subjects an heritage to a right of servitude for the advantage of another heritage.

Real servitude then is that which obliges the proprietor of a neighbouring subject to allow his neighbour to draw any advantage from that subject to the advantage of his own, or not to do in his own subject what he might have a right to do, if his neighbour's right and conveniency allowed him. *Servitus enim in patiendo vel non faciendo consistit.* Whence it evidently results, that any servitude given for the advantage of a subject cannot consist in obliging the
owner

owner of the servient subject to do any thing in it.
See above, title II. § 2.

§ 4.

I. Real servitudes are distinguished into *city*, which take place when an edifice is subject to certain things for the advantage of another edifice, without regarding whether these edifices are situated in town or country; and into *rural*, which take place when the possessor of a land estate or heritage, gives a right of servitude for the advantage of a neighbour's land estate or heritage, even though these lands, fields, or heritages, were situated in town.

We shall treat of *city* heritages in article I. and of *rural* in article II.

II. Real servitudes are distinguished, in the second place, into affirmative and negative, (*affirmativas et negativas.*)

III. They are distinguished, in the third place, into servitudes whose use is continual, and into such whose use is not continual, (*in continuas et discontinuas.*)
See above, title II. § 5. and 6.

§ 5.

Real servitudes are established by the same methods as personal servitudes; namely,

1.) By a law; for example, it is ordained, that, when the road, conducting to a sepulchre or burial-place, is destroyed by an inundation, or otherwise, another ought to be allotted through the nearest land to the old road (*servitus viæ*).

2.) By the sentence of a judge in acts of division, (*judicia divisoria*), when the judge or arbiter assigns to one the property of a subject, and to another a right of servitude on that subject.

3.) By a legal settlement of the proprietor, to take place either during his life, or after his death.

4.) By prescription; see title II. § 7.; which, moreover,

over, acquires the right of servitude only to the person who exercises it. If then a member of a community had passed through a neighbour's heritage or court, for several years, the community itself would not thereby acquire a right of passage.

§ 6.

To establish a real servitude, it is requisite that he who constitutes it be proprietor of the servient subject.

Wherefore, a person who has not the property of a subject cannot constitute a right of servitude, nor bind a subject belonging to another to such a burden.

N. 1. When there are several proprietors of an heritage, the one cannot subject it to a right of servitude, without the consent of the other; because the right of property of the one, as well as of the other, (*condominium*), is extended over all the parts of the heritage, and the right of servitude could not consequently be exercised without using the joint proprietor's share. This is the reason that the proprietor who granted the servitude to his neighbour, may interrupt his using it, but he is bound to that neighbour for the eviction.

N. 2. All proprietors who have a revocable right of property, such as vassals, those who have a right of surface, leaseholders, or feuholders; the heirs called *fiduciarii*, &c. may indeed constitute a servitude, but the right of servitude falls when their right of property expires.

N. 3. When a person has only the usufruct of a subject, though it were of all the effects, a right of servitude cannot be established, (*quia servitus servitutis non datur.*)

§ 7.

N. 4. Real servitudes may also be constituted,

- 1.) On certain conditions, and then they do not begin

begin to have their effect till the condition exist.

2.) They may also be established so as not to take place till a certain time or day, (*sub die*); for example, when one grants his neighbour a right of pasturage upon his grounds, with this restriction, that he cannot begin to exercise it till the year following; but a servitude cannot be established to continue only a certain time, (*ad diem*); for example, six months; because the cause of a servitude ought to be perpetual.

In fine, one may, 3.) Limit the manner of exercising a right of servitude (*sub modo*), and grant, for example, the right of pasturage, only for black-cattle, or for sheep, or for a certain time of the year, or for certain places, &c.

§ 8.

II. That one may constitute a right of servitude, it is requisite, in the second place, that he who wants to acquire it for the advantage of his own subject, have also the property of the subject; because no man can, by a covenant or agreement which he enters into with another, acquire a right for a third party.

This is the reason that even a father cannot acquire, for his own son, a servitude on the adventitious camp and supposed camp peculiars, though he may do so on the profectitious peculiar. Far less can a partner acquire such a right for his partner, or a neighbour for his neighbour.

But one who has a right of property, though revocable, may acquire a right of servitude, because he may meliorate the cause of the direct superior, (*causam domini directi*.)

§ 9.

Servitudes may also be constituted and acquired by commissioners or attorneys. When a right of servitude is to be constituted, the commissioner must be provided

provided with a special power for that effect; but, to acquire a servitude, it is sufficient if the proprietor accept and ratify his commissioner's deed.

§ 10.

III. For a real servitude it is requisite, in the third place, that the person who grants it to a neighbour should also deliver it to him.

N. 1. This delivery is performed in affirmative servitudes by the patience of the proprietor of the servient subject, namely, when he suffers his neighbour effectually to exercise the right of servitude which he promised to him; and with respect to negative servitudes, their delivery is reckoned and reputed to be performed, when the proprietor, agreeably to his engagements, does not in fact what he has promised not to do.

N. 2. As to servitudes acquired by prescription, long use comes in place of delivery.

N. 3. When then real servitudes are constituted only by a simple covenant or promise, and when the person who has promised them will not allow them to be used, he to whom they are promised has no personal action against the promiser, whose effect is to oblige him to allow the person to whom the right of servitude was promised to exercise it; or else not to do in his own grounds the things which he has promised not to do in them.

The case would be otherwise if the servitude were acquired by virtue of a legacy, because then it is acquired and transferred by law to the legatary. And this is the reason that no personal action is competent to him; but he may claim his right by means of the action called *confessoria*, either from the heir, or from any other who interrupts him in the exercise of it.

§ 11.

IV. To constitute a real servitude, it is requisite, in the

the fourth place, that there be two proprietors and two different heritages, of which the one is servient, (*serviens*), and the other dominant, (*dominans*); for it is essential to a servitude, that the one be subjected to a burden which may turn to the advantage of the other; and this is the reason that a person cannot establish a servitude in his own favour upon his own subject or heritage, even though he were possessed of two subjects, of which the one might be servient to the other.

§ 12.

V. To constitute a real servitude, it is requisite, in the fifth place, that the subjects or heritages be neighbouring; for the nature of a real servitude consists in procuring to the dominant subject an advantage by the neighbourhood of the servient subject.

Nevertheless, the term *neighbourhood* is not taken in the strict sense of a place absolutely contiguous to another; but we judge of its vicinity by the advantage and use which a subject not far distant draws from it. Thus when two houses are but a musket-shot distant from each other, and when the heightening of one of them would hurt the prospect of the other, and intercept its view of a forest, or of a pond, they may agree on the servitude called *ne prospectui officiatur*, though there were between the two another house, provided it were low enough not to hurt the view of the dominant subject. But in case the proprietor of the house situated between the two others happen to heighten it, and thereby to render the right of servitude of the dominant house useless, by taking away its view, the servitude would be entirely extinguished, and the servient subject freed from its burden.

A man may also constitute the servitudes called *aqueductus*, *aquæbaustus*, &c. in favour of a subject distant from the servient subject more than a quarter of a mile: but if there were between the two an heritage

belonging to a third party through which the waters must necessarily pass, the servitude would be of no use, and would be null, unless afterward the proprietor of this last subject should consent that the waters might pass through his grounds. When a man, on selling his lands, reserves to himself, for example, the right of servitude, called *aquæductus*, which he had on the neighbouring grounds, that reservation is invalid, and the servitude falls; because neither the buyer to whom it was not sold, nor the seller who has no longer any neighbouring grounds, can exercise it.

§ 13.

VI. To constitute a real servitude, it is requisite, in the sixth place, that it procure some useful advantage to the dominant subject. The permission then given by the proprietor of a subject to walk in his garden, to take a refreshment in his summer-house, to draw water for his drinking out of his wells, to pluck an apple, &c. is not a real servitude; for all these actions are not advantageous for the subject itself.

Neither is the promise which the proprietor of a subject makes to his neighbour, therein to do some things which he has the natural liberty not to do, a real servitude; for example, to cause his house to be painted, to plant trees, &c. because that sort of burdens, which consist in doing certain things in a person's own subject, (*in faciendo*), procure no real advantage to the dominant subject. See above, title II. § 5.

N. 1. The right of real servitude being then established for the advantage of the dominant subject, it follows that the proprietor of that subject cannot use it but in as far as that use is really for the advantage of his subject. Wherefore also he cannot yield it in favour of another subject, because the dominant subject would cease to be profited by the cession.

N. 2.

N. 2. It must also be observed, that in real servitudes the proprietor of the servient subject is not excluded from the exercise of the same right granted to the dominant subject. He is consequently, by virtue of his right of property, intitled, and has a right to pass through the grounds on horseback, or with carriages, to send his cattle to pasture, provided the right of servitude itself be not thereby rendered useless.

If doubts should arise concerning the manner of exercising the right of servitude, it is the judge's business to regulate that exercise.

§ 14.

VII. To constitute a real servitude, it is requisite, in the seventh place, that the advantage which a subject reaps from its neighbouring subject be granted as a right of servitude: for if it be granted only precariously, and to oblige a friend, (*jure familiaritatis*), it is not a servitude; and the person who enjoys such a benefit purely precarious, cannot even avail himself of it to raise a personal action against any person who may dispute it with him.

It belongs, moreover, to the proprietor of the dominant subject to prove that he exercises his right as a servitude, (*jure servitutis*), unless he has exercised it long, namely, ten years when parties are present, and twenty years when absent. In this last case it is the business of the proprietor of the servient subject, to prove that the proprietor of the dominant subject exercises his right only in the precarious way.

§ 15.

VIII. To constitute a real servitude, it is requisite, finally, that it have a perpetual cause; that is to say, that the advantage reaped from it never come to cease entirely, though its use be sometimes interrupted.

All rural servitudes have then a perpetual cause, because one may constantly use the right of servitude;

for example, pass by a path on foot or on horseback, &c. though one does not pass there continually. See above, part II. book II. title II. § 5.

§ 16.

When one of the conditions requisite to constitute a real servitude is wanting, there is no servitude; for example, when a man allots to a subject some advantage on another subject not situated in the neighbourhood of the first, or when the dominant subject reaps no advantage from the servient, or when the servitude has not a perpetual cause. In all these cases there is no right of servitude belonging to the dominant subject; and the person who is proprietor, and to whom a promise has been made of gaining some advantage from another subject, has only a personal action against the proprietor of this last subject, to oblige him to give the enjoyment of the advantage according to his promise.

§ 17.

The effect of real servitudes (*servitutum prædialium*) with respect to a dominant subject consists,

I. In the supposed possession of the servient subject, which the proprietor of the dominant subject acquires, who also thereby acquires a right of using the servitude according to its nature, and of doing every thing indispensably necessary towards using it.

N. 1. As the servitude is annexed to the subject, and to all the parts of which it is composed, it follows, that a person in whose favour a right of real servitude is granted, may exercise it on all the parts of the subject. If then the lands which are liable in the servitude happen to be augmented and increased by alluvion or accession, the servitude is also extended over all its augmentations and accretions.

N. 2. If the proprietor of two subjects, in favour of which the same right of servitude has been constituted,

tuted, happen to alienate one of the two, the buyer and new possessor may likewise exercise the right of servitude. This takes place also when a man having a subject to which a right of real servitude is due, sells it in parcels.

N. 3. A real servitude cannot be divided. If then, for example, the right of passage, or of a foot-path, were granted jointly to two neighbours, each may exercise it wholly, (*in solidum*), because nobody can go in part by a path, and in part not.

§ 18.

II. The second effect of real servitude consists in the acquisition of a real right on the servient subject made by the proprietor of the dominant subject, who consequently acquires a real action, namely, the action *confessoria*, by which he may sue any possessor, and get himself supported in his right. This action and the real right pass to heirs and singular successors.

§ 19.

The effect of a real servitude with respect to a servient subject consists in the obligation of its proprietor, to suffer the proprietor of the dominant subject to exercise his right of servitude on the servient, according to the nature of the servitude, and the method prescribed, and to do nothing to hinder the exercise of that right.

N. 1. If the proprietor of the servient subject deny that it is liable in a right of servitude, he may defend its liberty by means of the action *negatoria*. See below, title XI.

N. 2. The proprietor of a servient subject has a right to alienate it with the burden of the servitude, and the proprietor of the dominant subject cannot hinder him.

N. 3.

N. 3. In fine, it has been observed, that in servitudes on rural subjects the proprietor of the servient subject cannot be hindered to exercise in it the same right as the proprietor of the dominant subject enjoys. See above, § 11. at the end.

A R T. I.

Of servitudes granted in favour of city subjects or heritages.

(De servitutibus prædiorum urbanorum.)

§ 20.

IT has already been shown above, § 2. that by city subjects or heritages (*prædia urbana*) must be understood edifices, where-ever situated, in town or country, and that city-servitudes consequently take place, when the proprietor of an edifice is obliged to suffer certain things from his neighbour, or not to do certain things in his own buildings.

Thus when two barns in the country are contiguous, and the one has a right of stillicide or letting its drop fall on the roof, or in the court of the other, it is an urban or city servitude, (*servitus urbana*); not with respect to the place where this right of servitude is exercised, but with respect to the use which regards edifices only. See § 2. above.

Among city subjects or heritages are reckoned pleasure-gardens situated in the country.

§ 21.

The servitudes granted in favour of city subjects or heritages are the following.

I. The servitude called *oneris ferendi*, which gives a right of getting the burden of a man's house supported

ported on his neighbour's. It takes place then, for example, when Seius can support or place a summer-house, a joist, or other burden, on the wall or pillar of Caius, and the latter is obliged to allow it.

N. 1. When the wall or pillar of Caius cannot support the burden, he is obliged to repair it on his own expense, or else to give it up to Seius. If Caius do neither the one nor the other, Seius is at liberty to advance the charges of reparation of the wall or pillar, and to demand them from Caius with all damage and interest.

But if, while the wall is repairing, it happen to be necessary to support the summer-house, the joist, or other burden, Seius must do it at his own charges.

N. 2. If Seius himself do not think proper to cause the wall to be repaired, or to raise a process on that head, and do not use his right of servitude for thirty years and more, he does not thereby lose it; and if Caius, after the thirty years, happen to repair the wall, Seius may place his burden upon it; because it was not his fault, and because it was Caius who was the cause of his not exercising his right.

If Seius, without having such a right of servitude, should take upon him to place on Caius's wall a summer-house or joist, this last may of himself (*de facto*) cause the summer-house or joist to be taken away.

§ 22.

II. The servitude called *tigni immittendi*, that is to say, the right that Seius hath to support a joist or other thing, and to fix it in Caius's wall, who is obliged to allow it.

This right differs from the preceding, because in the first servitude the burden is put upon the wall, whereas in the other the burden is sunk or fixed in the wall. The effect of this difference is, that in the servitude *tigni immittendi*, it is not the proprietor of the
servient

servient tenement, but the owner of the dominant tenement, who is obliged to pay the charge of repairing the wall.

When a man, without having such a right of servitude, fixes any thing in his neighbour's wall, the latter may hinder it, or cause the burden to be taken away by his own authority, (*de facto*.)

§ 23.

III. The servitude called *projiciendi et protegendi*. The servitude *projiciendi* takes place when Caius is obliged to allow his neighbour Seius to build a closet or summer-house, so as to project or hang over Caius's court; the servitude *protegendi* takes place, when Caius is obliged to allow Seius, in order to preserve his own wall from the waters, to have a projection of his roof over the court or ground of Caius.

N. 1. When Seius has a servitude *projiciendi*, he does not thereby acquire a right of carrying off the water, or stillicide, (*servitutem stillicidii*); far less can he pour out water, or throw over nuisances into Caius's court.

N. 2. The servitude *projiciendi* differs from the servitude *oneris ferendi*, and from that which is called *tigni immittendi*, because in these two servitudes the burden rests on Caius's wall; whereas in the servitude *projiciendi*, the closet or summer-house is not supported on the neighbour's pillar.

§ 24.

IV. The servitude called *altius tollendi*, which takes place when Caius is obliged to allow his neighbour Seius to heighten his house; which supposes that the laws do not allow Seius to raise his own house.

But as these laws do not take place in our dominions, neither is this servitude in use in them.

§ 25.

V. The servitude called *altius non tollendi*, which takes

takes place when Caius, who has a natural liberty to build on his own grounds as he thinks proper, is obliged to refrain from it, and not to heighten his edifices on account of the inconveniency which his neighbour Seius might suffer by so doing.

But this right of Seius cannot hinder Caius from forming on his own building, what is called a hanging garden, (*bortum pensilem*), and planting trees in it.

§ 26.

VI. The servitude of lights, called *luminis immit-tendi*, which takes place when Caius is obliged to allow his neighbour Seius to open the middle wall, and strike out a light towards Caius's grounds.

§ 27.

VII. The servitude called *officiendi luminibus vel prospectui*. This servitude supposes, that the proprietor, who has a natural liberty to do and to build on his own ground what he pleases, and who consequently may make an opening in his wall to receive the light, acquiesces nevertheless for several years in the prohibition of his neighbour to make an aperture in that wall. In this case the person prohibiting acquires by right of usucapion, (*jure usucapionis*), the servitude *officiendi luminibus vel prospectui*; for the other cannot make any opening in his wall for a window on that side, whereby he is deprived of the light which he might get from it. See above, part II. book III. title V. § 26.

§ 28.

VIII. The servitude called *non officiendi luminibus vel prospectui*. That this servitude may take place, it must be supposed, 1.) That Seius has from some of his windows a view into the court or garden, &c. of Caius, and receives light on that side. 2.) That Caius has, according to the received laws, a liberty to heighten his own buildings, so that Seius may have neither view nor light towards him.

N. 1. If then they agree together that Caius cannot build so as to stop Seius's light, the latter acquires by that agreement the servitude *non officiendi luminibus vel prospectui*, by virtue of which Caius can neither build, nor do any thing on his own ground to intercept Seius's view or light.

N. 2. When the right of servitude is constituted in general, (*in genere*), it is understood that Caius cannot stop the light, such as it actually is, but also that he cannot build, nor do any thing in another place to hurt Seius's light: the case would be otherwise if the servitude had been promised only for the light as it actually is, without being engaged to any thing else than to leave it as it stands.

N. 3. The servitude of a view (*prospectus*) does not differ from the preceding; for it consists likewise in Caius's having no power to do any thing on his own ground to intercept the view.

N. 4. This servitude *non officiendi luminibus vel prospectui*, comprehends the servitude *altius non tollendi*, in so far as Caius, by heightening his building, would stop Seius's prospect or light.

The servitude *non officiendi luminibus vel prospectui* may even take place, and be of some use, if the neighbour intended to take down his house; for example, when the light reflected by the neighbour's house increases the light of the house or of the dominant tenement; so that in taking down the house, or the servient tenement, the apartments of the house, or of the dominant tenement, should become darker thereby.

When then the rays of the sun, by falling on the servient tenement, are so reflected upon the dominant tenement, that they render the light of it brighter, the proprietor of the dominant tenement may oblige his neighbour, by virtue of this servitude, not to take down his house, that he may not hurt his light.

N. 5.

N. 5. A man who is subject to the servitude *luminibus non officiendi*, cannot build so as to take from the proprietor of the dominant tenement the sight of the sun, because the apartments which have the sight of the sun are much lighter for it.

N. 6. The servitude *non officiendi luminibus*, differs from the servitude *altius non tollendi*, in this, that a man who is subject to this last servitude may form a garden on his house, and plant, which cannot be done by one who is subject to the servitude *non officiendi luminibus*.

N. 7. It is called light, when a person can see the heavens, consequently the light comes from on high.

But it is also called a view or aspect when one sees the earth, for the sight may have for its object a piece of ground on a level.

§ 29.

IX. The servitude called *stillicidii recipiendi*. It must be observed, that no man, unless he has acquired a right of servitude, is at liberty to discharge the waters of his roof upon his neighbour's court or grounds; but every one is obliged to make them fall by common sewers or gutters upon his own court, or upon the public streets.

The servitude *stillicidii recipiendi* takes place then when Caius is obliged to allow the gutter or projecture of his neighbour Seius's roof to cause the waters to fall upon his house, on his court, or elsewhere on his ground, and when Seius consequently cannot turn them off, or make them fall elsewhere; this has also occasioned this servitude to be called *servitus non avertendi*.

N. 1. The sink, gutter, or discharge of water, (*stillicidium*), cannot be made more burdensome; whence it follows that the projecture of the roof cannot be brought further over Caius's court than it was.

N. 2. As there often happen differences on account

of common sewers and gutters and their reparation, our will is that what follows be observed.

When a gutter rests entirely on the wall or roof of one of the two neighbours, the person who bears that burden shall not be obliged to contribute any thing for its reparation: but when the gutter is supported on a middle wall, or is laid between the two roofs, both proprietors shall contribute to the reparation of the gutter, even though they made no agreement on that head.

N. 3. To prevent any dispute with respect to gutters, our will is, that for the future no new building be erected in towns till the commissioners of buildings have first come to the ground, and determined *ex æquo et bono*, the distance at which the buildings are to be placed, that one house may not be incommoded by the drip and fall of waters from the neighbouring house.

§ 30.

X. The servitude *stillicidii non recipiendi*, which takes place when Caius cannot receive the waters of his roof upon his own ground, and is obliged to allow Seius to turn them off, receives them and collects them in his court, or in his own ground; whence it comes that this servitude is also called *servitus avertendi*.

This servitude is chiefly of great use in places where water is scarce, and where it is collected in cisterns, as also in places where it is wanted for watering gardens, &c.

§ 31.

XI. The servitude *fluminis recipiendi*, which takes place when Seius has a right to cause the waters which are collected on his ground to pass to Caius's court by a common sewer or canal, and Caius is obliged to allow it.

§ 32.

XII. The servitude *fluminis non recipiendi*, which takes

takes place when Caius is obliged to allow Seius to turn off the water collected in Caius's ground, in order to bring them into his own ground, so that Caius cannot stop them; which occasioned it to be called *servitus non recipiendi*.

Observe, that the water which falls drop by drop is called *stillicidium*; and that which runs in a torrent by common sewers, gutters, or canals, is called *flumen*.

§ 33.

XIII. The servitude *cloacæ immittendæ*, which takes place when Caius is obliged to allow Seius to carry and get passage through Caius's ground for the nuisances of his court, and, in particular, for those of his house of office.

To which, in some measure, may be referred the servitude called *sterquilini habendi*, which takes place when Caius is obliged to allow his neighbour Seius to put up against Caius's wall a hogsty or officehouse, which otherwise cannot be built but at a certain distance from his neighbour's.

§ 34.

XIV. The servitude *aquæ immittendæ*, which takes place when Caius is obliged to allow Seius to pour out water, or to throw nuisances out of his windows into Caius's court or property.

§ 35.

XV. The servitude *positum habendi*, which takes place when Caius is obliged to allow his ground to serve his neighbour Seius, to deposit on it certain things in places destined for them, and cannot himself lay any thing there without Seius's participation.

§ 36.

XVI. The servitude *fumi immittendi*. The smoke in this servitude is not the ordinary smoke which coming from a chimney, from a washing-house, or from

a room for washing, or for smoking, &c. incommodes Caius; for any proprietor of a house has a right to have in it such smoke; and a man might sue, in virtue of the interdict *uti possidetis*, a neighbour who would interrupt him.

The smoke then in question here is an extraordinary smoke, coming, for example, from a lime-kiln, from a brewery, &c. A man cannot indeed, without having a right of servitude, build a lime-kiln, or a brewery, if his neighbour be incommoded thereby, and the latter may hinder it by the action *in factum*, or even by the action of injury when it is done to wrong him; but the case is otherwise when they have agreed on a right of servitude on that account.

A R T. II.

Of servitudes granted in favour, and for the use of lands, or rural heritages.

(*De servitute prædiorum rusticorum.*)

§ 37.

BY lands, or a rural heritage, or peasants field, are understood here estates destined to rural uses, (*ad usus rusticos*), though they be situated in a town.

When then such lands are situated in a town, and the proprietor of the one grants to the proprietor of the other pasturage, passage, &c. it is a rural servitude, (*servitus rustica*); because this distinction of servitudes into city or urban, and rural, is not taken from the place where those heritages are situated, but from the use to which the servitudes are destined, and because those just mentioned are granted in favour of grounds or rural heritages.

§ 38.

§ 38.

Rural servitudes are the following :

I.) The servitude of a road or passage, called *iter*, which takes place when his neighbour Seius has a right to pass through Caius's ground, and the latter is obliged to allow it. In this case, not only Seius, but likewise all his family, and even the strangers who come to visit him, have the same right of passing through Caius's ground.

N. 1. They may pass on horseback as well as on foot; but it is not allowable to pass through them in a carriage, far less could Seius make his cattle pass that way.

N. 2. If a man has enjoyed a passage for thirty following years, he ought to be maintained in his possession; the laws allow him for that purpose the interdict *de itinere, &c. privato*.

N. 3. Seius has also a right to do all that is indispensably necessary for using a road or passage: he may, for example, build bridges, repair highways, &c. but all at his own charges.

N. 4. For such a road or passage four Rhenish * feet only are required.

§ 39.

II.) The servitude of a highway, or the way called *via*, which takes place when Caius is obliged to allow Seius to pass through his ground, not only on foot and on horseback, but also in carriages, and to carry through it carts loaded with wood, stones, &c.

N. 1. The servitude of a high-road or great road, (*via*), includes also what is called *aditus*; whence it follows, that Seius, who has a servitude of a great road, (*viæ*), may also drive his cattle on it.

N. 2. A man who is subject to the servitude of a high-road, or great road, (*viæ*), is obliged to allow for

* [This is the statute or established foot of measure over all the northern countries on the continent, and is to the Roman or London foot nearly as 950 to 1000.]

that purpose eight feet where the road is streight, and sixteen feet where it is winding.

This breadth may nevertheless be greater or less according as the parties agree.

N. 3. Seius is nevertheless obliged to use his right of servitude so as not to hurt Caius's fruit or trees.

§ 40.

III.) The servitude *actus*, that is to say, the right which his neighbour Seius has to drive his bestial through Caius's ground.

N. 1. By bestial is understood sheep, hogs, &c. but not poultry.

N. 2. The servitudes of a road or path, and of a high-road, (*itineris et viæ*), are not included in the servitude *actus*, but in so far as passage is necessary for driving the bestial, unless the parties be agreed particularly that they shall be included in it.

N. 3. When a right of driving bestial has been granted on Caius's ground in general, Seius may cause them to be driven through the places most convenient for himself, and if any difference arise on that head, the judge shall regulate the place to be kept for the passage of the bestial. The breadth of the passage for the bestial ought to be eight Rhenish feet.

§ 41.

IV.) The servitude *aquæ ductus*, or the right of an aqueduct, takes place when Seius can carry water through Caius's grounds, whether he gets it in Caius's own ground, or if, getting it elsewhere, Caius be obliged to allow him a passage for it through his ground.

N. 1. This servitude is of use, when Seius has a scarcity of water, and is obliged to get it for watering of his lands, or his cattle, or for making his mill go, or for any other such advantage to his ground.

N. 2. To this kind of servitude is also referred the permission which Seius has, when he has too much
water

water in his current, to let it run off through Caius's ground.

N. 3. Seius is likewise entitled to do every thing requisite for him to use his aqueducts: he has, for example, a right to make canals, to draw ditches, to make stone aqueducts to carry the water, &c. provided he do not thereby hurt the other rights belonging to Caius's ground, such as the servitudes, *iter*, *via*, *actus*, &c.

N. 4. Seius may repair at his own charges the current from whence he brings the water, fortify and secure the banks, &c. and Caius is obliged to assign him a place sufficient and proper for laying down the materials needful for making those reparations.

N. 5. When the right of aqueduct (*servitus aquæductus*) is granted to Seius only for his pleasure; for example, for making cascades in his garden, this right is not a city, but a rural servitude.

N. 6. When Seius sells a part of his ground, the buyer or possessor cannot exercise this right of servitude for that portion which he has purchased, if Seius have already made an aqueduct for that which he has kept.

N. 7. Besides, Caius cannot, as proprietor of the servient ground, do or attempt any thing that may hurt the right of aqueduct: he cannot, for example, assign the place for a burying-ground, nor give to another such a right of servitude, if Seius were thereby to want water.

N. 8. If Seius's ground be augmented by any accretion, the right of aqueduct is also for the advantage of the accretion.

N. 9. The servitude of a by-road or passage (*itineris*) is included in the right of aqueduct.

N. 10. In fine, it must be observed, that to exercise this right, it must be founded, either, 1.) On agreement; or, 2.) On the custom of the place, when

there is no agreement; or, 3.) If the custom of the place can give no insight on that head, on the old state of things, and on what was practised before; or, 4.) Upon a decree of the judge.

§ 42.

V.) The servitude *aquæ haustus*, which takes place when Seius has a right to draw water for the use of his ground out of Caius's well or current.

N. 1. This servitude differs from the right of aqueduct, 1.) Because it is not necessary in the servitude *aquæ haustus*, to draw water out of a current, but it may also be drawn out of Caius's well. 2.) In this servitude the water is not carried in ditches, canals, or other like inventions, and one can only draw it in buckets, pitchers, and bottles, or flasks. 3.) Because it is requisite in this servitude, that there be a water-spring; whence it follows, that this right cannot be established with regard to the water of cisterns which are collected there from rains.

The servitude *aquæ haustus* may be constituted even though the well be not yet built; because the promise of this right of servitude includes the tacit condition, that it shall take place in case a well be dug afterward.

This servitude includes the rights of a by-path and highway (*iter et viam*), but only for going to draw water.

§ 43.

VI.) The servitude *pecoris ad aquam appulsus*, which takes place when Caius is obliged to allow his neighbour Seius to drive his cattle upon or through Caius's ground to water them.

N. 1. By cattle here are understood all four-footed beasts, even asses, sheep, swine, &c. unless the kind and number of the beasts be regulated.

§ 44.

VII.) The right of pasturage, (*servitus pascendi*),
which

which takes place when his neighbour Seius has a right to pasture his cattle on Caius's ground.

N. 1. If the right of pasturage be granted in general, Seius may send there all his four-footed beasts to pasture.

But if this right be restrained to one kind only, for example, to horned cattle, or to sheep, &c. no other bestial can pasture there but those agreed upon.

There is likewise no difference between the sheep which are shorn twice and others, but Seius cannot send there any diseased cattle; Caius has even a right to require security from Seius on this head.

A man cannot send to pasture any greater number than there were when the servitude was constituted, and it is reasonable that the increase of the cattle be excluded.

When this right is acquired by prescription none can be sent to pasture on Caius's ground but the kind and number of cattle which were really pastured there at the time that the prescription run.

N. 2. This right of servitude may be exercised in all places where Caius had before the right of pasturage, unless a certain time and certain places be agreed upon.

N. 3. No other use can be made of this right of servitude, but that to which it is destined; so supposing Seius, who enjoyed a right of pasturage on Caius's ground had no longer any cattle, he would not have a right of causing grass to be mowed on that ground.

N. 4. Neither can Seius yield his right in favour of another subject or neighbouring heritage.

N. 5. But Seius's right does not hinder Caius from pasturing his own cattle on the same ground. See above, § 11. § 17. N. 3. Nevertheless, if one of the two should pretend to keep more cattle than the pasturage can maintain, the judge shall take cognisance

of it, and determine the number of beasts which each may have pastured on that ground.

N. 6. The proprietor of the dominant subject has no right to do any thing to render the servitude more burdensome. See above, title II. § 11. On the other side,

N. 7. Neither has the proprietor of the servient subject a right to do any thing that may diminish the pasturage. It is not then allowable for him, for example, a) To fallow pasture-grounds in order to make meadow or laboured grounds of them; b) To build on them; c) To make ponds on them, &c. ; and, d) When a man has a right of pasturage in another's forest, the proprietor cannot inclose it all or in part with pallisades, nor with a ditch, unless a part were cut down, or the trees decayed; for then he would have a right to sow in it fir-seed, or plant trees, &c. and to inclose it with pallisades or ditches; in which case those who have a right of pasturage in the forest are obliged to spare that place till the trees be come to a certain bulk; e) When the landlord of an estate, on which his tenants have jointly with him a right of pasturage, wants to fallow a part of it, which is marshy and barren, to make meadows of it, the tenants have no right to hinder him, and neither the landlord nor tenants can pasture their cattle there for three years. After the expiration of that term, the landlord shall every year have the first crop of hay; and immediately after it is made, the tenants may send thither their cattle to pasture, and so profit of the melioration of the common pasturage.

It must be supposed, however, that, in the mean time, the community do not want pasturage; and if any difference arise on that head, the opinion of persons experienced in œconomy shall be taken, and the difference shall be settled at the party's charges who shall succumb or have the worst in the cause.

N. 8.

N. 8. We cannot reckon as a right of servitude,
 1.) The pasturage that a whole community has upon an estate belonging to it. For every particular person, by getting his cattle pastured in the places which belong to the community, uses in that case a right of property, common to all such as are members of the community.

2.) Neither can we reckon as a right of servitude the permission granted precariously and out of pure kindness (*precario et jure familiaritatis*) to a neighbour for pasturing his cattle on grounds belonging to him who does him that favour, which in a dubious case is always supposed. This permission of pasturing cattle jointly with those of the proprietor of the ground, (*compascuum*), may be revoked when he pleases; and if the precarious title be clearly proved, either by writings, or by witnesses, his neighbour cannot found a claim even on prescription.

§ 45.

VIII.) In general, all servitudes by means of which a peasant's field procures any advantage to another like field, are reckoned among rural servitudes; for example, Seius's right to take out of Caius's ground, stone, lime, chalk, sand, clay, turf, peat, &c. the right of cutting wood in Caius's forest, gathering acorns, or sending swine to fatten there.

§ 46.

In dubious cases all servitudes granted for the advantage of a rural subject are rural servitudes, even though the subject were not mentioned, but only the proprietor, or though the agreement should also be extended to heirs, or the servitude were granted by a town or village to another town or village.

But if the ground itself reap no advantage from the servitude, and if the proprietor personally only profit
 of

of it, for example, if Caius allow Seius to walk in his park, to shoot in his forest, to draw water out of his well for drinking, or for the use of his kitchen, &c. it is not a servitude, and consequently Seius does not acquire a real right, but only a personal action *ex pacto ad id quod interest*. Whence it follows, that in these cases it is not necessary for the grounds to be contiguous.

§ 47.

All the servitudes of which we have just treated may be granted to severals, provided the condition of the first be not made worse by the establishment of the rights of servitude granted to the last.

T I T L E XI.

Of the actions acquired by servitudes both personal and real; also of such as the laws allow to those who deny that such a right of servitude is due to another.

(Quibus modis servitus vindicetur, vel ad alios pertinere negetur.)

§ 1.

IT has been said above, that all servitudes suppose the possession of a thing belonging to another, or of a right on a subject or heritage belonging to another, and that consequently delivery is necessary for constituting a servitude. See part II. book IV. tit. III. § 6.; part II. book IV. tit. X. § 20.

When then a servitude is only simply promised, and delivery has not followed, the person to whom the promise was made has only a simple personal action *ex pacto*, by which he may oblige the person who promised him the servitude to deliver it.

§ 2.

§ 2.

But when the servitude is constituted by delivery, the person in whose favour it is granted acquires a real right, and consequently a real action, which is called an action on one's own confession, (*actio confessoria*.)

§ 3.

A confessory action, or action on one's own confession, (*actio confessoria*), is a real action, by which we pretend that there is due to us, or our lands, a right of servitude on a neighbour's lands.

§ 4.

A confessory action (*confessoria*) is either direct or real.

§ 5.

A direct action is allowed to one in whose favour a personal or real servitude is constituted.

With respect to real servitudes, the proprietor of the ground alone can raise a confessory action; wherefore he is bound to prove his right of property, unless he possesses the ground in quality of proprietor.

No usufructuary then can claim the rights of servitude belonging to the land, unless the usufructuary wants to raise a confessory action in the proprietor's name. The case is otherwise, when an usufructuary is interrupted in the enjoyment of his usufruct, in which case he may claim the usufruct in his own name, by a confessory action.

§ 6.

The confessory action (*confessoria*) takes place against all such as interrupt the proprietor of the dominant grounds, to use his right of servitude; whether by force or only by words; or directly, for example, when the proprietor of the servient subject will not allow the instruments destined for the use of the servitude (*instrumenta servitutis*) to be repaired.

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It follows, from what has been just established, that this action may be raised, not only against the proprietor of the servient lands, who constituted this servitude, but also against any possessor of those lands. A man is also reckoned a possessor, who has fraudulently ceased to possess, or one who offers to defend the cause.

When there are several proprietors of this servient subject, and one of them interrupts the possessor of the servitude from using his right, the action may be raised against him for the whole, (*in solidum.*)

§ 7.

The direct action (*actio confessoria directa*) has, for its object, all the different kinds of servitudes, personal, real, rural, and urban. See above, § 5.

§ 8.

By raising a confessory action, a person pretends and maintains, that a servitude is due to him on a neighbour's subject; that, consequently, the possessor has no right to interrupt him in the use of it, and that he ought to put the demandant in the possession of this servitude, and be accountable to him for all damage and interest, (*cum omni causa.*)

The demandant may also require security from the defendant, that he will give him no future disturbance, (*cautionem de non ulterius turbando*); and, if he will not give it, he may be obliged so to do by an execution. In such a case, the judge is at liberty to annex penalties to his disobedience.

If the defendant succumb or be cast in the cause, and nevertheless continue to disturb the demandant in the exercise of his right, he shall be obliged to pay the damages occasioned to the demandant, according as the latter shall estimate them by his oath *in litem*.

When severals have a right to a servitude, and one of them

them is disturbed in the exercise of that right, he may alone raise a confessorial action for the whole (*in solidum.*)

Moreover, this action is competent also to heirs.

§ 9.

The advantageous action (*confessoria utilis*) takes place, when a right of servitude is acquired from a person who has not the property of the servient subject; or whose property is not full and entire.

Thence it follows that the direct action cannot be raised against a vassal, nor against one who has a right to the surface, nor against a leaseholder, and that there lies only against them, when they have constituted a servitude, *actio confessoria utilis*, an advantageous action.

A person who has other rights besides that of servitude on his neighbour's ground; for example, a right to tithes, to hunting, to a jurisdiction, &c. may claim them by an advantageous action, and demand that the person disturbing the claimant may be obliged to put a stop to the disturbance, and to leave him in the possession of his right. Every thing that is competent in a direct action takes place also in an advantageous action, (*in actione confessoria utili.*)

§ 10.

Such persons in whose favour a right of servitude has been legally constituted, have likewise other actions for supporting themselves in their real right; namely, 1.) An action of theft or robbery, (*actionem furti*), when any moveable thing is stolen, which was subject to a right of servitude: 2.) An action on the Aquilian law, (*actionem legis Aquiliæ*), when any damage is occasioned to the thing or lands subjected. 3.) The possessor of a servitude may also prohibit any innovation, which is called *novum opus nunciare*; and the laws have also allowed, 4.) Interdicts for the support of his possession, &c.

§ 11.

We have hitherto shown how a person who has a right to a servitude on his neighbour's estate may sue one who disturbs him in the exercise of his right, and redemand or claim it in a confessory action.

But as it often happens that a person, from whom a right is required denies it to be due, and consequently maintains that he is not obliged to allow it to be exercised, the laws have allowed him, for the support of his liberty, a negative action (*negatoria*.)

§ 12.

A negative action (*actio negatoria*) is a real action, by which a person against whom a right of servitude is claimed denies that the subject or estate belonging to him is liable in a servitude, concluding in consequence, that the person who claims it may be cast in his claim, that his estate be declared free from that burden, and, besides, that the person who occasions the disturbance be ordained no further to disturb him in the liberty which he enjoys.

§ 13.

This action is founded on natural equity, as every thing is to be reckoned free from any burdens till the contrary be proved. This is likewise the reason that a person who denies a servitude to be due, is not obliged to prove the freedom of his estate. This is also the case, even when the person who claims the right of servitude is actually in possession of it, and hath been supported in the most summary or ordinary possessory, (*in summarissimo vel possessorio ordinario*.)

When then the proprietor of the servient subject, after being cast in the possessory, raises a petitory which was reserved for him, that is to say, when he raises a negative action, he needs only found his action plainly on natural liberty; and, if the person who is

in

in possession of the servitude deny the subject to be free, it is his business to prove it by showing that the servitude was legally constituted. See the Frederician Code, part II. book III. § 10. and 11.

§ 14.

The negative action is likewise distinguished into direct and advantageous.

§ 15.

The direct action (*negatoria directa*) is only granted to a person who has the true and full property of the subject, on which another claims or possesses a right of servitude. But if the first do not possess the thing or subject, he must previously prove his right of property.

The advantageous action (*negatoria utilis*) is allowed to such as have only an advantageous or revocable right of property; the laws also allow it to such as deny that the demandant has any other right on their estate, than that of servitude, namely, the right of hunting, of tythes, of jurisdiction, &c. and who consequently maintain, that he is not founded in claiming such a right.

§ 16.

The negative action has then for its object the preservation of the liberty of an estate, over which another claims a right of servitude, or other rights which the possessor maintains are not due to him. By this action one may not only sue for the liberty of his estate, but likewise demand all his damage and interest.

T I T L E XII.

*How servitudes are extinguished.**(Quibus modis servitutes amittantur.)*

§ 1.

Rural servitudes (*servitutes prædiales*) cease and come to an end,

I.) When the estate for whose use the servitude was established, or the servient estate, happens to perish. Thus when a house in whose favour the servitude *stillicidii* had been established upon a neighbour's court, happens to be destroyed and demolished, the servitude comes to an end; in the same way, if a road on an estate, which is burdened by a right of servitude, happen to be rendered useless by an inundation, the servitudes, *iter*, *via*, and *aëlus*, cease.

N. 1. But, if the house be rebuilt, or the inundation come to cease, these servitudes shall be restored. Nevertheless, if, in the case of an inundation, the waters had formed, at the same time, a new channel, it would be a new species, (*nova species*); in which case the servitudes, *iter*, *via*, *aëlus*, would cease entirely, even though the waters should afterwards leave their new channel. See above, part II. book II. title III. § 9. N. 7.

N. 2. When only a part of the dominant subject perishes, the part which remains preserves entire (*in solidum*) the same right of servitude. When then, by an alluvion, a part of the dominant subject is carried away, or the lands happen to be diminished by the new channel formed in them, the part of the estate which subsists does not lose the right of servitude, which

which belonged to the whole, unless the alluvion, or the new-formed channel have deprived the owner of the dominant estate of all means of using his right of servitude.

§ 2.

II.) A servitude ceases, when the person to whom it is due does not use it in the manner prescribed, and according to the nature of the servitude. For example, if a person who has only a right to draw a certain kind of water, or to take it only at a certain hour, should draw another kind of water, or should take water at other hours, &c.

§ 3.

III.) Servitudes are lost when no use is made of them for ten years when parties are present, and twenty years when absent; but, for this purpose, the proprietor of the servient estate * must have prohibited the proprietor of the dominant estate to use the servitude, or, in fact (*ipso facto*), † have interrupted him. For example, if the proprietor of the servient subject build the side on which the proprietor of the dominant subject had right to strike out lights; if the last, wanting to put a beam or joist in the wall of the first, the latter shut up the holes of his wall destined to that purpose; if the owner of the servient subject heighten his house to the prejudice of the right which the owner of the dominant subject had to hinder him. In all these cases, if the proprietor of the dominant subject acquiesce in the fact or prohibition of the proprietor of the servient subject, for ten or twenty years, without using his right, the latter obtains the liberty of his estate by means of usucapion.

* L. 13. § 1. *Quem. serv. amitt. ib.* Non potest videri usucepisse vicinus tuus libertatem ædium suarum, qui jus tuum non interpellavit.

† L. 6. ff. de serv. urb.

It has been observed above, that, with regard to servitudes whose use is not continual, (*de servitutibus discontinuis*), there must be twenty years to prescribe the liberty of one's estate, even when parties are present.

N. 1. When the possessor of the dominant estate has been silent for nine years, reckoning from the time of being prohibited, and happening afterwards to sell the estate, the buyer does not exercise the right of servitude during the tenth year, the liberty of the estate is prescribed in the way of usucapion, and the seller's negligence is prejudicial to the buyer.

N. 2. Nevertheless, the proprietor of the dominant estate should not lose the right of servitude belonging to it, because he had made no use of it for a certain time. When that proprietor does not possess the estate by himself, but by others; such as a farmer, a leaseholder, or feuholder, and one who has a right to the surface. Indeed, in such cases, no negligence can be imputed to the proprietor, and he could still less be accused of it, if he had protested against the prohibition, either before a notary and witnesses, or judicially, and caused his protest to be notified to the proprietor of the servient estate.

N. 3. Neither does the not using a servitude incur any prejudice, when the proprietor of the dominant estate, out of friendship for his neighbour, does not exercise his right for a certain time, and takes an acknowledgment to that purpose.

N. 4. Besides, one does not lose the right of servitude by not using, but when it is not exercised at all. It is sufficient then, for the preservation of a person's right, that he have exercised it once in the ten years, or have used a part of the servitude. For example, a) A man who has the servitudes *actus, vie, &c.* does not lose them, if he constantly use the road for foot-passage, though he do not drive his cattle
on

on it during the time requisite for prescription.

b) When a neighbour has been allowed a passage through two estates, and passes constantly only through one of the two for ten or twenty years, he does not lose the right of passing through the other estate; because the passage through the two estates is but one and the same servitude, which he exercised in part. When one of the partners or joint proprietors uses a servitude belonging to a common estate, the other partner thereby preserves his right, even though each partner had a particular place assigned to him for using the servitude. The case is otherwise when, the estate having been divided, each has his separate share, and so are *socii vel condomini pro diviso*.

N. 5. Neither is a servitude lost by not using it, when the proprietor of the dominant estate is hindered from prosecuting his right; for example,

a) When he is furious, a prodigal, a minor, &c. Observe, that, when the servitude has been constituted, both in favour of a person who has attained the age of majority, and in favour of a pupil, the right of the person come to age is preserved by the pupil, who may demand restitution of the whole.

b) When the proprietor of the dominant estate is detained prisoner, and cannot take care of the preservation of his own right; which would take place, even though he were in prison through his own fault.

N. 6. It has also been declared elsewhere, that neither things common, nor those out of trade, can ever be lost by not using them.

§ 4.

IV.) When a person in whose favour a servitude has been granted on his neighbour's estate, makes no use of it for thirty years, his neighbour acquires the liberty of his estate by prescription, which is freed from

from that burden, and neither presumptive just (*bona fide*) possession, nor a just title, can enter into consideration.

§ 5.

V.) Servitudes come to an end also by confusion, when the two estates are united in one owner ; for example, when the possessors of the dominant and servient estate are heirs either to the other, or one of them sells his estate to the other.

§ 6.

VI.) Servitudes also come to an end, when the right of the person in whose favour they are granted happens to cease. When then a right of servitude has been granted to a neighbour by a person who has only a revocable right of property, such as a leaseholder, or feu-holder, a vassal, one who has a right of surface, &c. the servitude ceases when the right of the leaseholder, or feuholder, &c. expires.

§ 7.

VII.) The right of servitude is also extinguished, when the proprietor of the dominant estate renounces his right : but to render the renunciation valid, it is requisite, a) That the person who desists from his right be the sole proprietor of the estate in whose favour it is established ; b) That he have the full and entire property of it ; c) That it be an irrevocable property ; and, d) That the proprietor have power to dispose of his own estate.

N. 1. A renunciation may also be made tacitly, which happens when the proprietor of the dominant estate allows to the owner of the servient estate things contrary to the right of servitude ; for example, if Seius having a right of stillicide, and a servitude of not building higher, (*altius non tollendi*), on his neighbour Caius's court, renounce the last servitude. See below, § 11.

Likewise,

Likewise, when the proprietor of the dominant estate discharges a servitude on which another servitude depends; for example, if Seius having on Caius's estate a servitude of drawing water, (*aquæhaustus*), renounce it; he also renounces a right of passage, which is an appendage of it; even though he had often before made use of the passage for other purposes than to draw water.

§ 8.

VIII.) Personal servitudes are extinguished also by other means. See above, part II. book IV. title III. § 22.

§ 9.

IX.) When a servitude is only granted for a certain time, or for the life of the proprietor of the dominant estate, it does not cease indeed by law, by the expiration of the time, or by the death of the dominant proprietor, by reason that the cause of a servitude ought to be perpetual; but if the proprietor of the dominant estate want to exercise the right of servitude after the agreed time, he may be cast in his claim by an exception of fraud, or of covenant, (*exceptione doli vel pacti.*)

§ 10.

X.) A servitude does not cease by the proscription of the proprietor of the dominant tenement, nor by the confiscation of his effects; because a servitude is not annexed to the person, but to the estate, which, with all its rights, falls to the public. The case is otherwise with respect to a servitude of usufruct. See above, part II. book IV. § 21.

§ 11.

When a person possesses several servitudes on his neighbour's estate, though the one happen to cease by not using, or by renunciation, &c. that does not hinder the others from remaining in force.

N. 1. If then a man have upon his neighbour's house both the servitude of stillicide, and the servitude of not building higher, (*altius non tollendi*), and grant to his neighbour a permission to heighten his house, the servitude of stillicide is not lost, because the neighbour has no right to heighten his house, but in so far as that can be done without prejudicing the servitude not renounced.

But if his neighbour cannot heighten his house without prejudicing the servitude of stillicide, this servitude would cease also, because without that the permission of raising his house would be ineffectual.

N. 2. When the dominant estate belongs to several owners, in whose favour a real servitude has been granted, and when possessing each his share separately, (*pro diviso*), one loses his right by not using, or by renunciation, &c. this right does not accrue to the others. If then each have a right to send ten cattle to pasture on his neighbour's estate, and if one of them happen to lose his servitude, the rest do not profit by it, and can send each but the ten cattle that he sent before.

The case would be otherwise if the estate were common undivided, (*pro indiviso*.) See above, § 3. n. 4.

B O O K V.

T I T L E I.

Summary of the fifth book.

§ 1.

AFTER having explained the two first real rights, to wit, property and servitudes, (*dominium et servitutes*), we must now treat of the third real right, namely, of pledges and mortgages. See above, part II. book II. title II.

§ 2.

In the second title is shown what must be understood by a pledge and a mortgage; and the manner of constituting them is explained, and the effects which they produce in law.

§ 3.

In title III. we shall treat of tacit pledges or mortgages, and of the cases in which they take place.

§ 4.

In title IV. is shown what are the things which may be pawned or mortgaged.

§ 5.

In title V. we treat, by way of reference, of the right of priority due to a pledge or mortgage; and, in title VI. of the way of selling pledges and mortgaged estates, when the debtor does not pay.

§ 6.

In fine, in title VII. is shown what are the methods of extinguishing rights of pledge or mortgage.

T I T L E II.

Of the meaning given to the words pledge (de pignore) or mortgage, of the way of constituting them, and of the effects which they produce.

§ 1.

THE third real right is that which is called a pledge, (*pignus*.)

The word *pledge* is a general term, which includes,
a) The pledge properly so called, (*pignus in specie*); and,
b) Hypothec or mortgage, (*hypothecam*.)

By the word *pledge* is understood either a contract of pledge, (*contractum pignoris*), or the real right; that is to say, the right acquired on the thing itself, which is pawned, (*jus in re*). The contract of pledge shall be treated of in the third part, because it is among real contracts. And in this title we shall treat of a pledge as that name denotes a real right.

A pledge (*pignus*) differs from a mortgage only in this, that a pledge necessarily requires delivery; whence also it happens that the right of pledge may be established both on things moveable and immoveable, whereas a mortgage can only be constituted by a simple covenant, (*pactum nudo*), and only affects immoveables.

In both cases the creditor acquires a real right and a real action, which is called *actio hypothecaria*.

§ 2.

According to the law of nature there arises from a pledge or mortgage only a personal action *ex pacto*, which the creditor may raise against the debtor who has delivered the pledge, or constituted the mortgage,
to

to oblige him to pay what he owes, or to allow the pledge or immoveable subject mortgaged to be sold.

If the creditor have lost possession of the pledge, or of the immoveable subject mortgaged, he could not according to the law of nature redemand them, and a claim of right must be raised by the debtor himself, or he must yield his action to the creditor. It has been shown above for what reason the civil laws allow a creditor a real action, by which he has a right not only to require what is due to him from any possessor of the pledge, but also when he has lost possession of the pledge or immoveable subject mortgaged, to claim them in his own name.

§ 3.

A pledge or mortgage is then a real right with which a debtor affects his goods in whole or in part in favour of his creditor, and in security of what he owes him.

§ 4.

A pledge and a mortgage being established solely for the security of the creditor, it follows, that an obligation or a loan must necessarily precede, on account of which the pledge is delivered, and the mortgage constituted. Moreover, the obligation or loan may be pure and simple or conditional, and a pledge, &c. may be granted only for a part of the loan.

N. 1. It is sufficient nevertheless if the debt or obligation be natural, (*debitum naturale*); that is to say, if it be an obligation, which, without operating an action, has nevertheless the other effects of an obligation, (*effectus debiti*.) But a pledge, &c. cannot be granted when the obligation is civil, (*debitum civile*); that is to say, when there arises indeed an action from the obligation, but when the action is ineffectual, as happens when the action may be eluded by a perpetual exception.

N. 2.

N. 2. A pledge may be granted for a loan made to another, or for a future loan.

N. 3. But a pledge, &c. cannot be constituted for an obligation flowing from a crime, because the person obliged ought to be corporally punished; nevertheless, if the question be only about appearance in court, (*de judicio sisti*), or about a fine, a pledge, &c. may be constituted in such cases and for such obligations.

N. 4. A pledge, &c. is indeed an accessory of an obligation. Nevertheless, it is of a particular nature; thus a pledge subsists some time, though the obligation be null or extinguished; for example, when a curator alienating his minor's fortune without observing the solemnities requisite, and engaging his own fortune for the security of the sale, the minor afterwards gets the contract annulled; in this case the pledge subsists, and the curator may be prosecuted in an hypothecary action, (*actione hypothecaria*.)

§ 5.

The pledge, &c. is distinguished, 1.) Into general and special, (*in generale et speciale*); 2.) Into necessary and voluntary; 3.) Into express and tacit, (*expressum et tacitum*.)

§ 6.

A general pledge affects all the debtor's effects, moveable and immoveable, corporeal and incorporeal, present and future.

Among those effects are reckoned leasehold-estates, and quit-rents, but not the fiefs nor estates of the debtor's heirs, nor things out of commerce, such as things sacred, holy, and religious.

N. 1. The form used for the constitution of a general mortgage is *under the mortgage of all effects*, or *under the mortgage of all estates moveable and immoveable*; because

because actions and obligations (*actiones et nomina*) are included.

It is not then a general mortgage when all the immoveable subjects only are engaged.

N. 2. In a general pledge are not included the things which the debtor has not probably comprehended, such as the things used daily in a family, in furniture, table-linen, wearing-apparel, beds, &c. as well as the tools of his trade.

N. 3. A special pledge affects only one or several things to which it is restrained. We reckon likewise as a special pledge a collection or universality of things, (*universitas, corpus*), or a whole composed of several parts; for example, a flock of sheep, a warehouse of merchandise pawned, &c.

N. 4. Accessions are also included in a special pledge. Wherefore accretions to an estate which happen by alluvion, belong to the pledge. Likewise lambs for replacing sheep that may perish, merchandise bought after the constitution of the pledge for the warehouse, calves while they are not separated from their dams, fruits hanging on the trees, &c.

N. 5. When a debtor mortgages his estate, on which another has a right of usufruct, that right is not included while the servitude continues: but as soon as the usufruct is reunited to the property, the fruits which have not been separated belong to the pledge.

§ 7.

A necessary pledge is that which is established by authority of a judge, when by way of execution a person is put in possession of a thing, or of an estate, or heritage, (*per inmissionem*). This pledge is also established by a sequestration, real seizure, or taking possession, (*per missionem in bona*), &c.

N. 1. A voluntary pledge is established either by an agreement, (*ex conventionem partium*), or by a testamentary

mentary settlement. It is established in this last manner, when the testator obliges his heir to become surety for Caius, by giving pledges to Caius's creditor.

N. 2. To constitute a pledge it is not necessary to give an obligation or bond in writing: nevertheless it may serve to prove the right of preference, and in that respect is of some use.

§ 8.

The pledge or express mortgage. (*pignus expressum*) is a pledge stipulated expressly by words; a tacit pledge is that which is established by the laws to take place tacitly, that is to say, without agreement. It shall be treated of by way of reference in the following title.

§ 9.

Any proprietor of a thing, or of an estate or heritage, who has a power to dispose of it, may subject it to a right of pledge or mortgage.

Thence it follows that a pledge cannot be constituted on a thing belonging to another: nevertheless, if the pledge were established by the debtor, and the proprietor of the thing pawned became heir either of the debtor or the creditor, the pledge would thereby be rendered valid; which would likewise happen if the creditor or debtor should become heir of the proprietor of the thing pawned.

N. 1. It is sufficient however if the debtor have the civil or advantageous property of the thing which he pawns; wherefore also leaseholders, those who have a right of surface, and others who have a real right, are empowered to constitute a pledge; but vassals have no right to do so without the consent of the direct superior. It must, moreover, be observed, that in such cases the right of pledge ceases, when the civil or advantageous property happens to expire.

N. 2.

N. 2. When a person who constitutes a pledge on a thing is owner of it only in part, the pledge takes place only on his share.

N. 3. The proprietor of a subject may also pawn or mortgage by a third party, namely, by a commissioner, whom he has furnished with special full powers to alienate or pawn the thing. A general commissioner or attorney is impowered to establish a pledge, 1.) When he has borrowed and employed a sum for the profit and advantage of the debtor, because that step is a part of his administration, and the debtor thereby becomes richer. 2.) When being guardian he pawns things belonging to his pupil, because, on one side, the guardian has a right to do alone whatever is lawful to be done by the real proprietor; and, on the other side, the pupil suffers no prejudice by it; for if he be hurt, he ought to be restored to his full right. Nevertheless, if the question be concerning immoveable subjects, the guardian has not a right to mortgage them, till previously he have obtained a decree of alienation, (*decretum de alienando*.) 3.) When the proprietor approves the deed of his attorney or commissioner, either expressly, or at least tacitly by his silence. 4.) When the proprietor having previously allowed his general commissioner to borrow sums, and give mortgages for security, the latter has formerly constituted one or more such mortgages.

N. 4. A *bona fide* possessor has also a right to constitute a pledge or mortgage; for he has very near as much right as the real proprietor. Nevertheless, a person, in whose favour a pledge has been established by a *bona fide* possessor, if he happen afterward to lose the possession, has a right (in imitation of what takes place in a Publician action) to raise an action of mortgage only against the person who possesses the pledge on a less title than his own; and this is the reason that he has never a right to raise this action against the real proprietor.

§ 10.

We shall treat below, in title IV. of the things on which a pledge may be constituted.

§ 11.

The effect of a pledge, or of a mortgage, legally established, consists, 1.) In the creditor's acquiring thereby a real right, (though the immoveable subject mortgaged have not been delivered.) Whence it follows, that he may transfer to another his right of pledge, or mortgage. But, if the creditor yield his right of pledge or of mortgage to another, with a view to hurt the debtor's right, and that he may have more trouble in redeeming the things pawned or mortgaged, the debtor may raise against the creditor an action of *stellionate*, for fraudulently alienating what was not his own.

2.) In this, that, in a competition of creditors, a person who has a right of pledge or mortgage, is preferred to creditors by writing, or personal creditors, * a subject which has been treated of in the *Frederician Code*, p. 306.

3.) In the creditors having power to sell the pledge or immoveable subject mortgaged, when the debtor does not pay what he owes.

4.) In his having power to support himself in the possession of the pledge or estate mortgaged by means of interdicts; for example, by that which is called *interdictum Salvianum*. In fine,

5.) The principal effect of this real right is, that the laws have allowed to the creditor an hypothecary action, or an action on his mortgage.

§ 12.

The hypothecary action, or action on a mortgage, (*actio hypothecaria*), is a real action, by which the

[* This seems to be another book under this title, directing the form and method of procedure in law-suits.]

creditor

creditor may redemand the pledge or immoveable subject mortgaged, from all such as are in possession of it.

§ 13.

The laws have allowed this action, both to the creditors to whom the pledge was delivered, and to such in whose favour the mortgage was established, without making any distinction between the pledge or mortgage, general or special, necessary or voluntary, express or tacit.

N. 1. The laws ordain, in particular, in favour of the proprietor, who lets a country-estate in farm, that when the farmer shall pawn to him the moveables and effects which it yields, without, however, delivering them, the owner of the estate may claim them from any possessor by an hypothecary action, which, in the case in hand, has the particular name of *actio Serviana*; so that the proprietor, or lessor, has a right either to raise a personal action against the lessee, to obtain from him his damages and interests, or to oblige the possessor to restore the things pawned. But in this last case the lessor is bound, previously to demand his reimbursement from the lessee, and to seize and put to execution the effects both of the lessee and his surety, even though some effects may be specially engaged to the lessor.

N. 2. The laws having allowed a tacit pledge, both to the proprietor or lessor of a rural heritage, on the fruits arising from it, and to the proprietor or lessor of a city-heritage, on the furniture which the lessee has carried into the house hired by him; it is not necessary that they should have expressly stipulated in their favour a right of pledge, which they have by the benefit of the laws.

N. 3. The hypothecary action is transmitted to heirs; but singular successors, (*successores singulares*),
Y 2
such

such as, for example, assigns or cessionaries, have the action called *hypothecaria utilis*.

N. 4. When there are several heirs, each has a right for himself alone *in solidum*, to raise an hypothecary action.

§ 14.

The hypothecary action takes place against all such as possess the pledge or heritage mortgaged, or who are reckoned possessors, and in so far as they possess it. And the possessor has no right to object to the creditor, the benefit of rank, (*beneficium ordinis*); that is to say, to require him to prosecute first the principal debtor, excepting in the case of n. 1. of § 13.

This action likewise takes place against the possessor's heirs, but only in so far as they are in possession of the pledge or immoveable subject mortgaged.

§ 15.

The creditor who raises this action ought to prove, 1.) That the pledge and mortgage are valid; 2.) That the defender possesses the thing pledged.

§ 16.

The possessor is obliged to restore the pledge or immoveable subject mortgaged, with all its appendages, (*cum omni causa*). Among these however are not included the fruits which the possessor has received fairly (*bona fide*), because they never belonged to the creditor.

§ 17.

When the possessor, after being condemned to restore the thing pledged or mortgaged, delays so to do, the creditor may constrain him by way of execution, or otherwise he may sue him to be accountable for his damage and interest, which he has a right to estimate on his own oath *in litem*.

§ 18.

§ 18.

No creditor has a right to feize, on his own proper authority, (*propria et privata auctoritate*), the thing pledged or mortgaged, unless he wants to be exposed to lose all his debt, which in such a case is to fall to our exchequer.

§ 19.

We shall treat in title VII. of the different ways in which a pledge or mortgage ceases and is extinguished.

T I T L E III.

Of tacit pledges or mortgages, and of the cases in which they are tacitly constituted.

(In quibus causis pignus vel hypotheca tacite contrahitur.)

§ I.

A Pledge and mortgage may be tacitly constituted, and such engagements are called tacit hypothecs, or mortgages.

The laws determining the cases in which a pledge and mortgage are tacitly constituted; our will is, that no other tacit mortgages be admitted, but such as are approved or determined by our laws, and that they be not under pretext of parity of reason extended to other cases.

We have moreover determined, in our Frederician Code, part IV. the cases in which tacit pledges or mortgages are to take place.

T I T L E IV.

Of the things which may be pledged or mortgaged.

(Quæ res pignori vel hypothecæ datæ obligatæ sunt.)

§ 1.

THE laws allow to pledge or mortgage all things moveable or immoveable, corporeal or incorporeal, present and future.

Thus when a man wants to borrow money, he may pledge and mortgage, for the creditor's security, not only his houses, his lands, but also the different rights of servitude, *viæ, itineris, ædus*.

The debtor may also pawn to his creditor the pledge which has been established in his favour.

He has also a right to engage or pawn to him an obligation or bond belonging to himself in property; in which case, however, the creditor is not impowered to raise against the debtor's debtor an action of mortgage. He would have, nevertheless, against this last debtor, the action called *hypothecaria utilis*, if this debtor had likewise constituted a pledge, or a mortgage to his creditor, and if the latter had pawned his debt.

§ 2.

Thence it evidently follows,

I.) That a pledge or a mortgage cannot be constituted on a thing which belongs to another. See above, tit. II. § 9. and 10.

When then a thing is common to several proprietors, and one of them pledges or mortgages the common thing, the pledge or mortgage is valid only proportionally to his share.

There are, nevertheless, cases, in which a pledge
or

or mortgage may be constituted, on a thing belonging to another; for example, a) When a guardian engages his pupil's effects. b) When a commissioner or attorney engages things belonging to his constituent. c) When an administrator of the effects belonging to another mortgages them for the security of what he borrows for meliorating his constituent's fortune.

Nevertheless, administrators of effects belonging to cities are not impowered to mortgage them without the approbation of the chambers of war, and of our domains.

Likewise, d) When a fortune belonging to another is mortgaged on condition, and in case the mortgager acquires the property of it. This condition, moreover, is always tacitly understood, when the debtor mortgages his future effects.

e) A thing belonging to another is likewise validly engaged if the proprietor consent to the engagement, or afterward ratify the pledge or mortgage, or become heir to the mortgager; but the pledge is not valid, though the proprietor become heir to the creditor.

f) When a man has a real right in a thing belonging to another, he is impowered to pledge or mortgage such a real right. See above, tit. IV. § 1.

§ 4.

When a creditor engages a subject or estate, all its accessions are included in the pledge.

Thus, when a person has mortgaged an area or void place, and afterwards builds a house there, that house is also included in the mortgage.

When a person mortgages a land-estate, and the estate afterwards gets any accretion by alluvion, that accretion is also included in the mortgage.

§ 5.

II.) A man cannot engage things which their proprietor has not a right to alienate, as the things of which the laws have prohibited the alienation. Among these things are reckoned,

- 1.) The dotal fortune.
- 2.) Litigious things; that is to say, things with respect to which there is a suit depending.
- 3.) Fiefs and feoffments in trust, of which only the fruits and other customs can be pledged.
- 4.) Things sacred, holy, and religious, because they are all out of the commerce of mankind.

§ 6.

III.) There are some things which, for particular reasons, cannot be pawned; for example,

- 1.) The arms of soldiers, and every thing belonging to their uniform.
- 2.) The instruments and utensils for the use of a peasant's grounds (*instrumenta rustica*), in which are included every thing indispensably necessary for labouring of the grounds, and for agriculture.
- 3.) The maintenance allotted to the mortgager on an estate or heritage.
- 4.) Personal servitudes, because they are annexed only to the person. But when the proprietor reaps any advantage or profit from them, he may pledge the profit. Wherefore he has also a right to pledge or mortgage his usufruct, but not the servitude which consists in use, (*servitus usus*.) See above, tit. III. § 6.
- 5.) All real servitudes which suppose neighbourhood (*viciniam*), and an advantage arising from them in favour of the dominant estate; because both cease when they are engaged to a third party.

T I T L E V.

Of the preference allowed in a competition of creditors, in such as have a right of pledge or mortgage.

AS this subject has been treated at length in the * Frederician Code, part II. title II. p. 297. and following, we are satisfied to refer thither.

T I T L E VI.

Of the alienation and sale of pledges, and immoveable subjects mortgaged.

(De distraktionem pignorum et hypothecarum.)

§ 1.

WHEN a debtor does not timeously pay what he owes, the creditor is at liberty to take the pledges and immoveable subjects mortgaged, and to sell them; but three cases are to be distinguished; namely, 1.) If it have not been agreed in the obligation or bond, concerning the alienation or sale of the pledge.

2.) If the alienation or sale of it have been permitted; or,

3.) If it have been prohibited.

§ 2.

In the first case, when the debtor does not pay at the expiration of the term agreed, it is lawful for the creditor to sell the pledge or immoveable subject mortgaged; which is a consequence of the very nature of a pledge. For the creditor's security consists in the

[* See note on p. 170.]

liberty of alienating or selling the pledge, (*in facultate alienandi*;) so that the creditor himself cannot renounce the alienation or sale, which can neither be hindered by the opposition or by the appeal of the debtor.

§ 3.

In the second case, when the alienation or sale has been permitted, the creditor has so much the greater right to alienate or sell the pledge or immoveable subject mortgaged, that the debtor has already consented to it.

§ 4.

It is requisite in both cases,

1.) That the debtor be backward in paying, (*in mora solvendi*); that is to say, that he have been already warned and summoned to pay, or that, in the obligation or bond, a certain day be fixed on which the reimbursement ought to be made; and, in this last case, there is no need of warning, unless it were particularly agreed that it should be used.

If any difference arise on account of the alienation, or sale of the pledge, it shall quickly and summarily be adjusted by the judge; and the sale shall not proceed till the judge have determined the difference; but, when he has given sentence, there lies no appeal against his judgment.

2.) That the creditor act fairly, *bona fide*, in the alienation or sale of the pledge; that is to say, that he employ all his care to find buyers, who may pay reasonably for the pledge, that, if possible, there may remain something for the debtor, after paying of the debt. The creditor must also shun all collusion with the buyers, or with the auctioner: and, if he know that the pledge does not belong to the debtor, he ought not to put it to sale.

3.) That the creditor, if the obligation bear the manner of proceeding to the alienation or sale of the pledge,

pledge, comply exactly with what has been agreed on that head.

§ 5.

In the third case, when the alienation has been prohibited, one has a right, notwithstanding that prohibition, to proceed to the sale of the pledge or immoveable subject mortgaged. It is not sufficient however, in this case, to take the precautions prescribed in *N. 1.* and *2.* of the preceding article; but, a) The creditor must likewise, at fifteen days distance, thrice summon his debtor to pay him, warning him, that, failing of payment, he shall be obliged to sell the pledge. b) That, after the three summonses he still suffer two years to run, after which he may, without any other advertisement, sell the pledge.

§ 6.

It must likewise be observed, that all sales of pledges or immoveable subjects mortgaged, ought to be made judicially.

* We have enacted in the Frederician Code, p. 199. and 287. the manner of proceeding in the sale of moveables; and, p. 201. and 287. § 14. what must be observed in the alienation of immoveable subjects.

That he may proceed to this alienation or sale, the creditor is then obliged to apply to the debtor's judge, to produce before him the obligation, or bond, or the decree; to show that he has observed the forms mentioned above; and to demand that a day be fixed to make the valuation; after which he shall proceed to the auction, the manner prescribed in the Frederician Code.

§ 7.

When the subject is sold agreeably to what the laws ordain, the buyer acquires the full property of it, or the real right which had been mortgaged to the creditor, and sold to him. The debtor has no right to

[* See note on p. 170.]

redeem what is thus sold ; far less could he, on pretext of enormous wrong, get the sale annulled.

§ 8.

When a pledge is sold which does not belong to the debtor, the buyer obtains only a right to the power of acquiring it by usucapion or by prescription.

N. 1. When the real proprietor of such a subject sold comes to evict it from the buyer, the creditor is not properly the seller, it is the debtor who is to be reckoned such.

But the buyer a) may raise against this debtor the action *empti utilem*, that he may warrant to him the subject sold ; b) He may also oblige the creditor to yield to him the action competent to him against the debtor with respect to the pledge, which is called *actio pignoratitia contraria* : in this case he may sue the debtor, and conclude for his being obliged to indemnify him on account of that pledge belonging to another, and to manage so, that he may surely get his reimbursement.

The case would however be different, and the creditor who brings a pledge to sale might be obliged to desist from the eviction, 1.) If he knew that the pledge sold did not belong to the debtor ; 2.) If he were answerable for the eviction ; 3.) If he sold the pledge as being his own property ; 4.) When the creditor has promised to warrant the buyer only, because without that nobody would have bought the pledge ; he is indeed obliged to put a stop to the eviction, but he has a right to take his recourse on that account against the debtor to obtain his damages and interests.

§ 9.

When a pledge is put to sale by a creditor, without his being impowered so to do, for example, without the debtor's being backward in payment, the sale is null in law, and the debtor may redemand the subject

ject from all such as possess it, if they have not besides acquired it by way of usucapion.

§ 10.

When the creditor has indeed a right to sell the pledge, but does not observe the solemnities prescribed above, the debtor is empowered to demand of him all his damage and interest, by virtue of the action *pignoratitia*.

And if the buyer knew that the creditor did not observe those solemnities, the debtor may raise against the buyer the action *venditi utilem*, to oblige him to restore the subject which he has bought, with the fruits received and to be received, provided the debtor pay him its price with the interests.

§ 11.

When the pledge or immoveable subject mortgaged has been legally sold, not only the debtor loses the property of it, but if there be posterior creditors to whom the subject sold has likewise been mortgaged, their rights and mortgages come to an end; because their right is restricted to what may fall to them of the price of the sale after the creditor who has a prior mortgage is satisfied.

§ 12.

N. 1. When the posterior creditors reckon it their advantage to keep the subject mortgaged, they have a right to offer to the first creditor what is due to him, and to come in his place; a benefit which is entirely equitable.

N. 2. This benefit (*beneficium offerendi*) is allowed,

I. To a posterior creditor, who thereby acquires the prior creditor's right, but only for the sum which was due to that first creditor; wherefore also the thing engaged is not a security for the posterior creditor's debt; the latter however is not obliged to accept

cept payment of one of the two debts, if the other be not paid at the same time.

When the second creditor has offered to pay what is due to the first creditor, and he wants to proceed to the sale of the subject engaged, the creditor who follows him may likewise offer to reimburse the second creditor; but this third creditor must reimburse the two sums due prior to his own.

When the first creditor wants to proceed to the sale of the thing engaged, and the second does not think proper to offer him his payment, the third or the fourth, &c. creditor may be allowed to do so, and he is not obliged after that either to hear or to accept the offers which may be made to him by prior creditors, who have not used the requisite diligence to make their offer.

II.) The possessor of the thing engaged, who has sued only an hypothecary action, has also a right to avail himself of the benefit of offering payment, (*beneficii offerendi*.)

Thus when, for example, Seius sells to Caius a subject which he has mortgaged to Mævius, and Mævius, in virtue of the hypothecary action, wants to redemand from Caius the subject mortgaged, Caius is at liberty to offer Mævius, on a cession of his right, what is due to him of capital, interest, and expenses.

III.) In fine, the debtor himself may offer payment to the possessor of the thing engaged who hath paid the value or estimation of the process, (*estimationem litis*); for example, when Seius has engaged a thing to Mævius, and Mævius engages the thing to Caius, in this case the debtor Seius has a right, on offering to pay what he owed to Mævius, to redemand from Caius the thing which Mævius had engaged to him.

If Mævius had engaged the thing for a greater sum than what was due to him by Seius, the latter would

would not be obliged to pay more than he owed to Mævius.

Moreover, the offer to pay cannot take place but when the thing engaged has not been actually, or has not been legally (*rite*) sold; for when it has been legally sold, the right of offering (*jus offerendi*) no longer takes place.

T I T L E VII.

Of the methods by which pledges or mortgages are extinguished.

(Quibus modis pignus vel hypotheca solvitur.)

§ 1.

A Pledge or mortgage is extinguished, and ceases to take place with respect to the thing itself engaged, or with respect to the obligation for the security of which the pledge was constituted.

§ 2.

With respect to the thing engaged, the pledge or mortgage is extinguished, 1.) When the creditor desists from it, and restores it; which may be done either by express declaration, or tacitly; either by delivering the pledge to the debtor, or by consenting, without reservation of his right, that the debtor alienate the thing engaged; but in this case the debtor must really alienate it. Moreover, the simple knowledge of the alienation of it made by the debtor is not sufficient to disengage or redeem the thing engaged, unless the alienation be made in favour of the public, or of a pious community.

When the creditor consents that the thing engaged
serve

serve for security to some other creditor, he does not discharge his right of pledge, but only grants the priority to the new creditor, who ought to be ranked before him in a competition of creditors.

When the debtor acquires by any other new title (*ex nova causa*) the thing engaged, and alienates it afterward with the consent of the creditor, the pledge is not thereby relieved, unless from the beginning the debtor had granted to the creditor a general mortgage on all his effects.

2.) When the debtor gives another pledge to the creditor for the security of what is due to him, and the creditor accepts it, the first pledge no longer subsists, and is thereby extinguished.

3.) It is likewise extinguished, when having been established for a certain time, that time is elapsed.

4.) The pledge or mortgage is likewise extinguished by usucapion or prescription, when a third party acquires fairly (*bona fide*) and by a just title the thing engaged, and possesses it all the time requisite to entitle him to acquire it by prescription, namely, a year if it be a moveable subject, ten to twenty years if it be an immoveable subject, and thirty years if the question be concerning the debtor himself, who has had the subject among his effects, but without possessing it fairly (*bona fide*) and on a good title.

5.) The pledge or mortgage is extinguished, in the fifth place, when the right which the debtor had to the subject engaged happens to cease; thus when he has engaged the produce of his usufruct, or the advantages which he reaps from a fief, or from an emphyteusis or long lease, &c. all these engagements no longer subsist when once the debtor has lost his own right.

Thence it follows, that the second creditor loses his right of pledge or mortgage, when the former creditor has legally put to sale the subject engaged;

gaged; because the debtor's right was thereby extinguished.

When Caius binds or provides to Titius a thing which Seius had engaged to him, and Seius afterward pays to Caius, the engagement made in favour of Titius ceases, because Seius having satisfied Caius, the latter had no longer any right in the thing engaged.

6.) A pledge or mortgage is extinguished, in the sixth place, when the thing engaged happens to perish.

If it perish only in part, what remains continues engaged for the security of the creditor; wherefore, when a house is mortgaged, if it happen to be destroyed, the creditor preserves his right of mortgage on the area or ground.

The thing engaged is reckoned perished, not only when all the substance of the thing is destroyed, but also when its form or species is so changed, that it cannot be restored to its former state: thus when a house has been mortgaged to a creditor, the mortgage is not extended to the materials, if the house happen to be destroyed.

In like manner, when a forest is mortgaged, the mortgage cannot be extended to the fall of wood taken out of it, nor to a ship built of that wood. In the same way, the right of pledge which a person had on wool ceases, if it be employed in making a suit of cloaths.

Note. When a servitude has once entirely ceased, it cannot afterward be revived.

§ 3.

The pledge or mortgage is extinguished with respect to the principal obligation,

1.) When the debtor, or his commissioner or attorney, or a third person, pays the whole debt, with the interest, charges, and damages, occasioned by the debtor's

fault; for if the payment be not entire, the pledge subsists *in solidum* for the security of what remains due, however small the sum be.

2.) When the creditor is satisfied in any other way; for example, when any other thing is given him in payment, (*per dationem in solutum*); likewise, when the obligation is extinguished by what is called in law *acceptilation*, (*per acceptilationem*), or has been changed into another by novation, (*per novationem*), without any mention made of the pledge.

3.) When the debtor and creditor become heirs either of the other.

A distinction however must be made, whether a person be heir purely and simply, or if he succeed only on condition of restoring the succession, (*sub lege restitutionis*.) In this last case the pledge subsists, if the heir not having accepted the succession willingly have been obliged to do so.

4.) When the obligation is extinguished by compensation, which happens when the debtor has a clear and liquid claim against the creditor, and can make it good immediately; for the debt being by law destroyed by the compensation, it evidently follows, that it extinguishes the pledge which is only an accessory of the debt.

5.) When the debtor, for good reasons, and after the judge has taken cognisance of them, (*prævia causæ cognitione*), consigns the debt judicially.

6.) When the creditor discharges the debt to the debtor, and promises not to exact it; which may also be done tacitly, by giving to the debtor the obligation or bond.

7.) When the debtor is by a sentence acquitted and absolved of the demand which has been made on him; which ought to take place even though the sentence were unjust.

8.) When

8.) When the debtor being allowed his oath, swears that he owes nothing to the creditor.

9.) When the debt is prescribed, and the creditor has not raised the hypothecary action within thirty years.

§ 4.

When the pledge or mortgage no longer subsists, the creditor has nevertheless a right to keep the thing engaged by right of retention, (*jure retentionis*), if the debtor be owing him on any other account, till the other debt be likewise paid.

B O O K VI.

T I T L E I.

Summary of the sixth book.

§ 1.

WE have reckoned among real rights (*jurium in re*) successions; see above; and shown, that they are conferred either without will, (*ab intestato*), or by will.

When a succession or inheritance is conveyed without a will, the inheritance is a natural method of acquiring a real right, (*modus acquirendi juris in re naturalis.*)

But when it is conveyed by will, it is a civil way of acquiring a real right, (*modus acquirendi juris in re civilis.*)

We have referred the explication of these two kinds of succession to this sixth book and the following, both on account of the extent of this subject,

and in order to treat of real rights, all in the same place.

But it must previously be observed, that successions comprehend two kinds of rights, namely, 1.) The right of property and other real rights; and, 2.) The personal obligations of the defunct. Whence it follows, that by reckoning successions among real rights, and referring them to the second object of law, inheritances have been considered only as they comprehend the right of property or other real rights, and not as they include personal engagements, which belong to the third object of law, which consists in personal obligations.

- This is also the reason that, a) the name of universal right (*jus universum*) is given to successions or inheritances, namely, because they include all real and personal rights, (*jura realia et personalia*); for the same reason, b) the action which results from inheritance is mixed, because it is real with respect to real rights, and personal with respect to personal rights.

§ 2.

We shall treat in the second title of the fourth real right, which is acquired in the way of succession or inheritance, (*jure hereditatis*), and of the origin of successions in general.

§ 3.

In title III. shall be explained how descendants succeed without will.

§ 4.

In title IV. how ascendants succeed without will.

§ 5.

In title V. how collaterals succeed without will.

§ 6.

In title VI. shall be shown how widows succeed without

without will, by virtue of a right peculiar to them,
(*proprio jure.*)

§ 7.

In fine, in title VII. shall be seen how a succession falls without will to our treasury.

T I T L E II.

Of the fourth real right, which is acquired by the method of succession or inheritance; and of the origin of successions.

(*De successione in genere.*)

§ 1.

THE fourth real right is acquired in the way of succession or inheritance, (*per hereditatem.*)

By succession or inheritance is understood that settlement in virtue of which a man succeeds to the rights and effects which another has left at his death.

§ 2.

Succession is conveyed either without will or by will.

Those who succeed are, 1.) Children or descendants; 2.) Ascending relations; and, 3.) Collaterals; to these successions the civil laws have added, 4.) That of a husband to a wife, and of a wife to a husband; and, 5.) That of our treasury.

The three first orders of successions are founded on natural reason and equity, as shall now be shown.

§ 3.

We have shown elsewhere that a family is a body or domestic society, which nature itself has formed, and which may be viewed in two different lights;

1.) *Jure proprio*; that is to say, in a proper and particular

particular meaning, according to which a family is composed only of the father, of the mother, and of their children; 2.) *Communi jure agnationis*; that is to say, in a more general meaning, in so far as a family includes all the relations of one and the same stock. See part I. book I. title VII.

§ 4.

A family being then, in some measure, but one body, formed by nature, there naturally results from it different privileges annexed to that body, which have been already mentioned. Thence it specially results, that while any one of the family remains, it is not extinct; and the person who survives succeeds to all the rights belonging to the family.

§ 5.

When then a person of the family comes to die, his effects remain, according to the order of nature, with those of the family who are called to successions, in virtue of a right peculiar to them (*jure proprio*); among whom are comprehended only fathers and mothers, and their children. Wherefore, according to the course of nature, children succeed to their fathers and mothers.

This is also the reason, that, according to the Roman laws, a) Children are called to the succession of their fathers and mothers, both by nature, and, b) *Ex voto parentum*; that is to say, because usually fathers and mothers wish to have their own children for their heirs. c) For the same reason, they are reckoned but one person with them; d) They are answerable for their deeds; e) They are their own and necessary heirs, (*sui et necessarii heredes*); their successions cannot be disappointed, and they are held, in some measure, even in the lifetime of their fathers, as proprietors of their paternal effects, (*pro dominis quodammodo bonorum paternorum.*)

ternorum.) It is also for the same reason, that, according to those laws, the paternal succession is called *familia*, and the action by which we proceed to a division of the succession, *familiae erciscundae judicium*. For fathers and mothers transmit their successions to their children, by virtue of the family-right (*jure familiae*).

This is the origin of the succession without will of descendants.

§ 6.

By the law of nature, according to which the laws of the Twelve Tables have settled successions among the Greeks and Romans, the successions of fathers and mothers cannot take place. The reason of this is manifest; because the children, as natural members of the family, were under the power of the father, as head of the family, who was master of all they acquired; so that, at the death of the children, there was nothing which could be an object of succession; because all that the children had remained the father's, after their death as well as before, by virtue of the right of paternal power, (*jure patriae potestatis*.) But the laws having afterward granted to children some effects, called *peculiars* (*peculia*), and the power of disposing of them, the succession of fathers and mothers began to take place. For when children do not exercise the power which is given them, and do not dispose of their peculiars, these effects remain in the family; that is to say, the fathers and mothers succeed to their children by virtue of a right which is peculiar to them, (*jure proprio familiae*.)

And this is the origin of the succession without will of ascendants. Whence we see that the Roman laws were well founded, when they declared that ascendants were not called to the succession of their children by nature, but only from a motive of compassion,

compassion, (*quod sola ratio miserationis, non natura, ascendentes ad bonorum successionem vocet.*)

§ 7.

When there are neither descendants nor ascendants, and when consequently the defunct has left after him only collaterals, the family exists in the agnats, but only in virtue of the right of agnation, (*jure agnationis*), which does not comprehend the effects which are transmitted only to those of the family who succeed by a right peculiar to them, (*jure proprio*.)

Nevertheless, considering that agnats are included in the family, by the common right of agnation, (*jure communi agnationis*); for they descend all from the same stock, the laws have found it equitable that the effects should come to them without will.

And this is the origin of successions without will, which take place in virtue of the common family-right, (*jure communi familie*.)

§ 8.

But as, according to the law of nature and the laws of equity, when a father, a child, a brother, or a neighbour, come to die, the succession ought necessarily to fall, by virtue of the family-right, to those who are relations in the nearest degree, there thence resulted this inconveniency, that they would have been obliged to leave their effects, by equal portions, to deprived children, or to unnatural fathers and mothers, or to unworthy collaterals: this is the reason that the laws have allowed dying persons, contrary to the nature of all settlements, to dispose of their effects after their death, to gratify one child more than another, provided that every one have his legitim, and even to disinherit children for certain causes, to exclude collaterals, &c.

And this is the origin of wills, and of testamentary succession,

succession, of which we shall treat in the following books.

T I T L E III.

Of the first order of succession without will, namely, of the succession of descendants.

§ 1.

WE have already shown above, that children continue in the family after their father's death; that is, they succeed without will in his right.

§ 2.

All children, without distinction of sex, born in lawful marriage, or legitimated by a subsequent marriage, succeed to their father's effects, whether they be under the paternal power, or have been delivered from it by emancipation.

Likewise, posthumous children, that is, such as are born after their father's death, but in due time, and alive. Moreover, the portion to be reserved for them is already determined, in expectation of their birth.

§ 3.

Among lawful children are also reckoned, a) Such as have been assumed (*arrogati*), that is to say, such as have been adopted, not being under the paternal power, as well as such as have been adopted by an ascendant, (*adoptati ab ascendente*;) b) Such as have been born of persons publicly betrothed before the nuptial benediction; c) Such as are born of a marriage esteemed valid, (*ex matrimonio putativo*), by the two parties, or only by one of the two parties, having a fair presumption to reckon their marriage lawful, though it be null in law.

§ 4.

All the other children not comprehended among those just enumerated are not lawful children, and are not consequently capable of succeeding. Such are those, 1.) Who have been adopted by a stranger, (*ab extraneo*); or, 2.) Such as have been legitimated by a rescript from the prince, though they be declared capable of succeeding; unless the father, having no lawful child nor wife, have requested us to grant them a right to succeed in his allodial effects; and unless, in consequence, we have granted them this right; or, in the cases where there are lawful children, or a wife, the children or wife have given their consent to the succession of the legitimated children.

§ 5.

3.) Bastards also are incapable of succeeding to their fathers. Nevertheless, when a person of an honest burgher-family, or of a higher condition, shall have committed a fault, without, however, leading an irregular life, neither before nor after his fault, and shall have, on the contrary, a good testimony from such as know him, our will is, that the bastard, or, if there be severals of them, all together inherit a sixth of their father's and grandfather's succession, (*duas uncias*); which sixth shall be divided between them and the mother.

N. 1. When a man shall have had bastards by several women, none of them shall have a right to claim this benefit, but they shall all be obliged to be satisfied with aliments.

N. 2. This right of succeeding to the sixth of their father's effects, is only granted to the bastard himself, and not to his children, supposing even he has had them of a lawful marriage.

N. 3. It must also be observed, that by a will this sixth of the effects may be taken from the bastard.

N. 4.

N. 4. As to the mother, bastards are capable of succeeding to her effects, and they share her succession by equal portions with the lawful children, which she has had either before or after their birth. Bastards are even admitted to the successions of maternal ascendants, but they do not succeed to the effects of collaterals.

§ 6.

Far less are reckoned among lawful children persons born in incest or adultery, who do not even succeed to the sixth of the effects of their ascendant relations.

Nevertheless, when the father and mother have acted with presumptive honesty, and, being ignorant that they were relations within the degrees prohibited by the law of God, have completed the marriage, it is indeed annulled, but the children cannot be excluded from the succession, and they are heirs to their fathers and mothers in the same way as lawful children. If, nevertheless, these persons, after being informed of the incest, continue to live together, the children born of such a correspondence would be very lawfully excluded from their successions.

§ 7.

Children who go over from the Protestant religion to the Roman Catholic, or from the Roman Catholic to the Protestant, are not excluded from successions. It would be otherwise, if they passed to a religion which were not one of the three tolerated in the empire; or if the person who changes his religion settle out of the country, in a place where the Catholics who become Protestants are excluded from successions, in which case the law of retaliation (*lex talionis*) shall take place.

§ 8.

Under the name of children are comprehended,

B b 2

not

not only the children of the first degree, namely, sons and daughters, but also the children which they leave after their death, grandsons and grand-daughters, who come in place of their deceased fathers and mothers, and consequently get the portion which their fathers and mothers would have inherited if they had lived. Observe, that this representation, or rather this transmission (*transmissio*) takes place without end.

N. 1. It is not requisite, moreover, that the grandsons and grand-daughters be conceived in the lifetime of their grandfather; it is sufficient that they be begotten of their reputed father, though it were even after their grandfather's death, and one single day before the death of their father.

N. 2. Grandsons and grand-daughters do not come to the succession when their father and mother have renounced it; for, being admitted to the succession only by virtue of their father's right, they can by no means enter into a right which their father has renounced.

§ 9.

As to emancipated sons, they transmit, after their death, to their heirs, their right of succession, in the same way as the other children not emancipated, with this distinction, however, that the transmission (*transmissio*) takes place only with respect to their children, and by no means with respect to stranger heirs (*ad heredes extraneos*), unless the emancipated person had died during the time of deliberation, (*intra tempus deliberandi*.)

§ 10.

The children capable of succeeding, whom we have just enumerated, succeed without will to the effects both of their father and mother, and exclude grandfathers and grandmothers from the succession.

§ 11.

§ 11.

When there are children of several marriages, and a father, for example, has children by two wives, the children of both marriages succeed, all by equal portions, to their father's effects, and consequently also to the effects of the two wives, which the father has acquired in full property. But, as to the mother's effects, the children of the first marriage succeed to their mother, who is the first wife, and those of the second marriage to their mother, who is the second wife.

The same is the case when a woman has children of two marriages. These children succeed by equal portions to their mother's effects; but, as to their father's effects, the children of the first marriage succeed to the effects of their father, the first husband, and those of the second marriage to their father, the second husband.

§ 12.

When a widower, having children by his deceased wife, marries a widow who has likewise children by her first husband, these children succeed to the effects of their deceased father and mother, and exclude from these successions the common children of the after-marriage of their father and mother.

§ 13.

Children lose their right of succession,

1.) When the effects of their father and mother are confiscated; in which case, nevertheless, the legitim ought to be preserved to them.

2.) When the children themselves have been banished, or their effects confiscated; in which case the fathers and mothers cannot claim a legitim.

3.) When the children renounce their paternal succession; and,

4.) When they apostatize. See above, § 7.

§ 14.

§ 14.

In fine, it must be observed that the children who at the time of their father's dying intestate are nearest to succeed him, are called his own and necessary heirs, (*sui necessarii heredes*), because it is not necessary that they declare themselves heirs, and that they have only the benefit of abstaining from the succession, (*beneficium abstinendi*). They shall be treated of more at large below.

§ 15.

But, 1.) The father, or grandfather's widow, is admitted to the succession with the children, for a fourth, when there are in life three children, or less than three. If there be four, or more than four, she has only the portion of one child.

N. 2. She also is reckoned a lawful widow, whose bridegroom died after the nuptial benediction, though the marriage had not been consummated; or she who, after public espousals, has lived with her deceased bridegroom before the nuptial benediction, and had a child by him.

Thence follows, that this succession differs from succession to the statutory portion. For, to be admitted to this last, the nuptial benediction is necessarily required, because the statutory portion is a benefit which ought not to be allowed to such as contravene the laws. See part I. book II. title IV. article VIII. § 149. n. 3.

N. 3. Grandsons and grand-daughters are also of the number of the children, with whom the widow comes in competition for the succession.

§ 16.

That a widow may become a competitor for the succession, it is requisite,

I.) That she have had no dowery, and that no certain portion have been assigned to her, either by the statutes

statutes or by the contract of marriage, or even by will; and, in all these cases, no distinction is made whether she be rich or poor.

When then a defunct husband has given, either by donation while alive, or by will, a certain share to his widow, who had no portion, supposing the share be not a fourth of the effects, the widow has no right to ask any thing else but a supplement, to make up what is wanting of the fourth. The laws grant her for that purpose the action called *Condictio ex lege ad supplementum quartæ*.

II.) It is requisite, in the second place, that the widow be poor, and that the defunct have died rich.

N. 1. A widow is reckoned poor, even though she could gain her livelihood by the labour of her hands, or have a rich father, &c.; or though, after her husband's death, she may have got considerable heritages. On the other side also, if she were rich at the time of her husband's decease, she could not demand the fourth, even though she should afterward fall into poverty.

N. 2. The defunct husband is reckoned rich, when he leaves sufficiency of effects for allotting to his widow the fourth, in the portion which falls to one of the children, without prejudicing the children, and the education which they ought to get according to their station.

N. 3. If any dispute arise, about determining whether the widow be poor, and whether the defunct were rich, the estimation of the effects shall be made such as they were at the defunct's death, the debts deducted, and, in a dubious case, the judge shall decide the matter.

No. 4. This fourth is not a share of the defunct's effects. Wherefore the effects ought to be valued, in order to determine the fourth, after the debts have been deducted from them, which would not be necessary,

fary, if the fourth were reckoned a share of the inheritance which is given by law, with the burdens as well as with the advantages, (*ipso jure cum onere et commodo*), without any necessity either of a valuation or deduction of the debts. b) Legacies are deducted from the fourth, and consequently the fourth is not paid out of the legacies, (*ex legatis.*) c) This fourth can neither be augmented nor diminished, excepting in the case that the defunct's effects were augmented by virtue of a right already acquired before; for example, if any thing had been promised to the defunct, under a certain condition, and the condition did not exist till after his death, &c. all this would not take place, if the fourth were due to widows by virtue of a right of inheritance, (*jure hereditario.*)

N. 5. The widow acquires only the usufruct of this fourth when there are children: wherefore, when she comes to die, the property of it returns to the children; but, if the children die before the widow, she acquires the fourth by a full right, (*pleno jure.*)

N. 6. A husband cannot, by any testamentary settlement, deprive his widow of this fourth, nor diminish it; neither can he, to defraud the fourth, alienate his effects, nor estimate them below their value.

N. 7. When the defunct's effects have been confiscated, the exchequer has no right to deprive the widow of this fourth.

N. 8. This succession of the widow ceases to take place, 1.) When there is a statutory portion settled in her favour; the reason of which is, that in this case she does not succeed by virtue of the law, but by virtue of the statutes. 2.) When the husband has left by will to his widow a certain quantity of effects; because in this case she does not succeed to him intestate, but by virtue of the will; and besides, if the share which the husband has allotted to her be below the fourth,

fourth, what is wanting in it ought to be supplied by virtue of the action *condictio ex lege*. 3.) When the widow has brought a portion to her husband, and he has made her a donation on account of the nuptials; because in this case the widow does not succeed intestate, but by virtue of an agreement, (*ex pacto*), and consequently she has all the actions arising from matrimonial agreements, (*ex pactis dotalibus*.) Besides, what is wanting to make up the equivalent of the fourth ought likewise to be supplied, in virtue of the action *condictio ex lege*. 4.) When she is rich, and has wherewith to live according to her station, and her husband has died poor.

T I T L E IV.

Of the second order of succession without will, namely, that of ascendants.

§ 1.

WHEN there are no descendants, the succession falls without will to the share of the ascending relations of the defunct, namely, to the father and mother, and if they be dead, to the grandfather and grandmother both by the father's side and mother's side.

§ 2.

The father and mother succeed by equal portions; and if one of the two be dead, the other succeeds alone, and excludes all the grandfathers.

N. 1. But this right of succeeding to descendants belongs only to lawful and proper ascendants; wherefore the laws exclude illegitimate fathers, who are never admitted to the successions of their illegitimate children.

As to the mothers, they are the natural heireffes of their illegitimate children when they die intestate; but when the children are born in adultery or incest, neither the father nor the mother, nor the other relations are allowed to succeed them, and their succession, if they happen to die without leaving descendants, falls to the exchequer.

§ 3.

The laws exclude, in the second place, from the succession of children, such as are their fathers only by adoption, (*patres adoptivos*), excepting when the adoption was by an ascendant; in which case the father by adoption succeeds alone, and not his wife; or when the question is about the adoption (*de arrogatione*) of such as are not under the paternal power.

When the adoption was made by an ascendant, the natural heirs of the adopted child, if there be any of them alive, stand in competition for the succession by equal portions with the adoptive father; but the children of a father by adoption can have no claim to the succession of their adoptive brother.

§ 4.

When a father and mother are dead, their predecessors, both paternal and maternal, succeed by equal portions, if they be all in life.

But if there be, for example, on the father's side only the grandfather, and there be on the mother's side grandfather and grandmother, they succeed in this case *in genera*; that is to say, the paternal grandfather receives alone as much as the maternal grandparents*.

If none of the grandparents be alive, the great-grandparents succeed in the same order, and in default of them the great-great-grandparents.

[* We have presumed to use the word *grandparents*, &c. as not knowing how otherwise to express *ayeux*, &c. which we imagine comprehends both grandfather and grandmother, &c.]

§ 5.

Ascendants succeed according to nearness of degree, (*juxta proximitatem gradus*), the right of representation having no place in this case. Thus when, for example, a son leaves at his death the mother of his father, and the grandmother of his mother, &c. the grandmother is excluded by the mother. See above, § 1. and 2.

§ 6.

The effects which come by the father's side are not distinguished from those that come by the mother's side, and the nearest ascendant succeeds to all the defunct's effects, because they have been once mixed as being his.

Whence it follows, that the father excludes the grandfather by the mother's side, though the son's fortune come from his mother; and the maternal grandfather divides the succession with the paternal grandfather, though the fortune comes from the defunct's father.

Note. This is particular with respect to effects comprehended in what is called in Germany *gerade*, that is to say, the utensils and furniture for the wife's use, that the mother and grandmother succeed to them in exclusion of the father.

And that, on the other side, the father and grandfather preserve the usufruct even in the portion of adventitious effects which fell to the share of the mother or grandmother.

§ 7.

Ascendants cannot succeed to descendants,

1.) When the effects of the children have been confiscated.

2.) When a mother arrived at the age of majority, and a grandmother neglects for the space of a year to cause a guardian to be appointed for their children or grandchildren, or when they cause incapable guardi-

ans to be named, and these children die before the age of puberty ; but the mother is not excluded from the succession of her child under age, for having neglected to get a curator for him.

3.) When the mother openly leads an irregular life, for example, if after her husband's death she bring to the world a bastard-child,

4.) When a mother or grandmother marries within the six months after her husband's death, even though she had obtained a licence on that head. See part I. book II. tit. III. § 7. n. 6. a.

5.) When she enters into a second marriage before settling with her children of the first marriage.

T I T L E V.

Of the third order of succession, namely, of the succession of collaterals.

§ 1.

WHEN the defunct leaves neither descendants nor ascendants, and dies intestate, his collateral relations succeed him in the order of the following classes.

A R T. I.

§ 2.

IN the first class succeed brothers and sisters german *in capita*, that is to say, by equal portions, and the brothers-german exclude all the half-brothers, both the brothers-consanguinean, (*consanguineos*), and the brothers-uterine, (*uterinos*).

§ 3.

When one of the brothers-german is dead, and has left children,

I.) These children come in competition for their uncle's

uncle's succession by lineage, (*in stirpe*); that is to say, they succeed only to the portion of the effects which their father would have inherited if he had lived, and so they have altogether but one portion of the succession.

II.) In the second place, the defunct's widow comes also in competition with the brothers-german for the fourth, which falls to her. See above, title III. § 16. And the widow of this class and the following acquires not only the usufruct, but also the property of the fourth.

III.) In the third place, the illegitimate children come also in competition for the defunct's succession for the sixth of his effects, (*in sexta parte*). See tit. IV. § 5.

A R T. II.

Of the succession of the children of brothers-german.

§ 4.

WHEN there are no brothers-german alive, but they have left children, these children succeed all by persons, (*in capita*); that is to say, by equal portions.

N. 1. When any of these children are dead, and have left children, the latter are not admitted to succeed with the defunct's nephews, by reason that the right of representation (*jus repræsentandi*) is not extended beyond the children of brothers and of sisters.

With the children of brothers-german come in competition,

1.) The defunct's widow for the fourth. See above, title III. § 16.

2.) The defunct's illegitimate children for the sixth of the effects, (*in sextante*). See above, title III. § 5.

A R T.

A R T. III.

Of the succession of half-brothers or half-sisters.

§ 5.

WHEN there are neither descendants nor ascendants, nor brother nor sister german, nor any child of these last, the half-brothers or half-sisters, both consanguinean and uterine, are called to the defunct's succession by persons, (*in capita*), without distinguishing whether the effects come from the father's side, or from the mother's side.

With the half-brothers come in like manner in competition,

- 1.) The children of the half brothers or sisters deceased who succeed by lineages, (*in stirpes*.)
- 2.) The widow for the fourth. See book III. § 16.
- 3.) The defunct's illegitimate children for the sixth of the effects. See book III. § 5.

A R T. IV.

Of the succession of the children of half brothers and sisters.

§ 6.

WHEN there are neither half-brothers nor half-sisters, but there are children of half-brothers or half-sisters, these children succeed by persons, (*in capita*.)

In this case also come in competition, a) The defunct's widow for the fourth; and, b) The defunct's illegitimate children for the sixth of his effects. See book III. § 5. and 16.

A R T.

A R T. V.

Of the succession of uncles and aunts, both on the father's side and mother's side.

§ 7.

WHEN the defunct has neither descendants nor ascendants, nor brothers nor sisters, whether german, consanguinean, or uterine, and these latter have left no children, in this case succeed the brothers and sisters of the father and grandfather by persons, that is to say, by equal portions, according to the nearness of degree, so that the brothers and sisters of the father exclude from the succession the brothers and sisters of the grandfather.

N. 1. No attention is given in this class to the double tie, (*duplicatatem vinculi*), but the brothers and sisters both of the father and mother succeed equally, and without any distinction. In this class come in competition as in the preceding, a) The widow for the fourth; and, b) The defunct's illegitimate children for the sixth of his effects. See title III. § 5. and 16.

A R T. VI.

Of the succession of the other collateral relations.

§ 8.

WHEN a man leaves no relations in the degrees specified in the preceding classes, all his other more remote relations may be called to the succession; but they are so always according to their nearness of degree. Thus, when the defunct leaves on the one side a grandson of his brother, and on the other a son
of

of his grandfather's brother, these two relations succeed by equal portions, because they are both relations to the defunct in the fourth degree, &c.

N. 1. The widow however, and the illegitimate children of the defunct come also in competition with them. See above, title III. § 16.

N. 2. The relation also who claims the succession must not only prove his affinity, but also the proximity of the degree.

And as there would arise on the head of proximity of degree a multitude of law-suits, when the relation is very remote, there shall no longer after the tenth degree be the least regard paid to kindred with respect to a succession without will, but the succession shall be reckoned as vacant, and shall fall to the exchequer.

T I T L E VI.

Of the case in which the widow of the defunct succeeds without will, by virtue of a right peculiar to herself.

(*Jure proprio.*)

§ 1.

WHen there are no relations, the widow of the person who died last succeeds not to the fourth, but to the half of all his effects, without even being obliged to contribute her own proper effects, and from the whole to take this half; in which this succession differs from the statutory portion. The other half of the defunct's effects falls to the exchequer.

The defunct's illegitimate children come in competition with the widow, and with the exchequer, for the sixth of his effects. See above, title III. § 5. & 16.

But

But this succession of the widow does not take place when there are marriage-articles, because the widow is obliged to hold to what is settled in those articles.

From this must be excepted widows of persons of quality, who, according to the feudal constitutions, have a right to make a choice between the portion settled in the marriage-articles and the benefit allowed them in this title.

T I T L E VII.

Of the cases in which the exchequer succeeds to the effects of persons dying intestate.

§ 1.

WHEN the defunct leaves neither relations within the tenth degree, nor a widow, the exchequer succeeds to all the effects which are vacant by his death, by virtue of the right which takes place with respect to vacant effects, (*jure bonorum vacantium.*) We have already seen in the preceding title, § 1. that when the defunct leaves a widow, the exchequer succeeds but to the half of the effects.

Whence it follows, that the particular treasury of a city, of a college, of a chapter, has no right to assume such vacant successions, unless it have been invested by us in all the rights of royalties.

§ 2.

That the exchequer may be admitted to the succession, it is requisite,

1.) That by three citations upon an edict, which are to be made at four weeks distance from each other, such as can prove themselves heirs of the defunct be summoned.

2.) That the judge have previously taken cognizance of the circumstances, to know if the succession be indeed vacant, consequently the fiscal has not authority forcibly (*de facto*) to dispossess the possessor, who has taken possession of the subject as heir; but,

3.) He is obliged to wait the sentence of the court, provided however that in the mean time he may oblige the possessor to give security.

§ 3.

It happens also frequently, that the succession falls to the exchequer without will, when by the will an unworthy heir is appointed, a subject which shall be treated in the following book, title XVII.

§ 4.

The effect of the exchequer's succession consists in this, that the exchequer comes in place of an heir, (*loco heredis*), and in this quality takes possession of the succession or inheritance. Whence it follows that the fiscal is obliged to observe all that is incumbent on other heirs.

He must declare within the time appointed whether he intends to accept the inheritance; he must make an inventory; and if he declare himself heir, must pay all the debts even beyond the extent of the inheritance, (*ultra vires hereditatis*); that is to say, he is obliged to pay the debts to whatever sum they should amount, and though they should exceed the value of the effects of the inheritance.

Among the effects to which the exchequer succeeds, are also comprehended the moveables which are in foreign countries, because these follow the person. It is otherwise with respect to immoveables, which return to the sovereign in whose country they are situated, by virtue of his right to all the vacant subjects there, (*jure bonorum vacantium*.)

§ 5.

§ 5.

When the exchequer renounces the inheritance, which it has a right to do, a curator or trustee for the effects of the inheritance shall be appointed to cite the creditors, and pay the debts.

§ 6.

If one possess fairly (*bona fide*) and on a just title, for ten, twenty, or thirty years, such vacant successions, he cannot however object to the exchequer, neither usucapion nor prescription, because that sort of successions can only be prescribed by the possession of forty years requisite for the prescription of other vacant effects, and of royalties.

§ 7.

The illegitimate children come in competition with the exchequer for the sixth of the effects. See above, title III. § 5. and 16.

§ 8.

Let us add, in fine, that as we are establishing one common law in all our dominions, it cannot easily happen that the statutes should be in opposition, and give occasion to collusions: nevertheless, if, contrary to our expectation, the thing should happen, our will is, that, without regard to the place where the defunct may have died, the laws received in the place of his residence, (*jura domicilii*), should be followed with respect to the moveable effects which he leaves; and with respect to immoveables, the statutes of the places where they are situated, (*statuta rei sitæ.*)

The domicil or residence is reckoned to be settled (*pro constituto*) in the place where one resides, even though he should remain there only on account of an employment which he has; for example, a commander in chief has his domicil or residence in the fortress under his command. When a man has his domicil

in two places, the laws received in the place where he died shall be observed, which shall also be followed.

When a man has no domicile, or has not resided constantly in one and the same place, as happens to such as are in the army, and who are frequently called to change their garrison, the laws received in the place where he died are to be observed.

B O O K VII.

T I T L E I.

Subject of the seventh book.

§ 1.

WE have shown in the preceding book how a real right is acquired by means of successions conveyed without will, and on that occasion we have determined that such an acquisition is founded on reason and equity.

We shall show in this seventh book how a real right is acquired by successions conveyed by will, a method of acquiring which has its origin in the civil laws.

§ 2.

We shall treat in title II. of wills in general.

§ 3.

In title III. shall be shown what are the solemnities or exterior formalities requisite in the composition of a will.

§ 4.

In title IV. we shall treat of the solemnities or interior formalities of wills, namely, of the appointing
an

an heir, and in particular of that which concerns children and parents, (*de institutione heredum, et speciatim liberorum et parentum.*)

§ 5.

In title V. of disinheriting of children and parents.

§ 6.

In title VI. of the complaint of undutifulness, (*de querela inofficiosi testamenti*), and of the legitim.

§ 7.

In title VII. of substitution both vulgar and pupillary, (*de substitutione tam vulgari quam pupillari.*)

§ 8.

In title VIII. of an inheritance of a feoffment in trust, (*de fideicommissaria hereditate.*)

§ 9.

In title IX. of the reciprocal will of a husband and wife.

§ 10.

In title X. of conventional successions.

§ 11.

In title XI. of privileged wills, namely, 1.) Of the military will; 2.) Of the will of a father among his children; and, 3.) Of a will made in time of pestilence.

§ 12.

In title XII. of codicils, (*de codicillis et clausula codicillari*), which are abolished unless they be made judicially.

§ 13.

In title XIII. of the conditions which testators have liberty to insert in their testamentary settlements, (*de conditionibus institutionum.*)

§ 14.

§ 14.

In title XIV. of the formalities requisite at the opening of wills, (*testamenta quemadmodum aperiantur.*)

§ 15.

In title XV. of the entering on an inheritance, and the ways of losing a succession; also of the right of deliberating (*de jure deliberandi*), and of the benefit of an inventory, (*de beneficio inventarii.*)

§ 16.

In title XVI. of the collation or communication of effects, (*de collatione et dotis collatione.*)

§ 17.

In title XVII. of the causes which may annul a last will.

§ 18.

In title XVIII. of the action which heirs without will, as well as testamentary heirs, have against such as dispute with them, or retain the succession; this action is called *petitio hereditatis*.

§ 19.

In fine, title XIX. treats of the action *familiæ eriscundæ*, which takes place when the succession itself is not disputed, but the question is about the division of all the succession, or only of a subject making a part of it.

T I T L E II.

Of testaments or settlements of last will in general.

§ 1.

A Testament or last will is a free settlement, plain and solemn, by which the person who makes the testament declares his will concerning every thing he wants to be done after his death.

A testament differs from a codicil, which contains also settlements in prospect of death, in this, that the codicil is not an universal settlement or disposition, and one cannot appoint an heir in it.

§ 2.

According to the law of nature, such a settlement could operate no obligation, because a will acquires force and value only after the testator's death, and at a time when no longer existing he has no right to dispose of his effects, so that the heir could no longer accept any thing from him; and for this very reason, that such a settlement operates no obligation, it results, that the testator, as long as he is alive, has a right to revoke and alter as he thinks proper his testamentary settlements.

§ 3.

All wills are either solemn or privileged. Solemn wills are such as, in order to their validity, require certain solemnities or essential forms; and privileged wills such where all those solemnities are not necessarily to be used.

Among privileged wills are reckoned, 1.) Wills of fathers among their children; 2.) Wills of soldiers; and, 3.) Wills made in time of pestilence.

We

We shall treat in title XI. of privileged wills.

§ 4.

To make a solemn will valid, it is requisite,

- I. That the testator have a right and power to make a will;
- II. That he do it freely, and without any constraint;
- III. That he do it judicially;
- IV. That certain formalities or forms be observed.

§ 5.

It is requisite, in the first place, that a person who disposes of his effects by will, have a right to make a will.

§ 6.

The power of making a will is among the things permitted, (*testamenti factio est e genere permissorum*); that is to say, that every man has a right to dispose of all his effects by a testamentary deed; so that one cannot be deprived of that power or liberty, not even by an agreement.

§ 7.

Which being supposed, the following persons have also a right to make a will; namely,

- I. Minors under age, both boys of sixteen, and girls of fourteen. It is not even necessary that the curator consent to it, and his opposition or protest would be ineffectual.

Moreover, that minors under age may make their will, boys must have completed the very last day of their sixteenth year, and girls of their fourteenth.

- II. Jews; as also,

- III. Children who are under the paternal power, when they are of the age mentioned in N. 1. and when they dispose of their camp, supposed camp, and extraordinary adventitious peculiars.

As to the adventitious and ordinary peculiar, they cannot

cannot dispose of it by will, except as to the property; for, with respect to the incomes and usufruct, they can leave them by will, only with consent of their father.

IV. Prisoners, and such as have been given as hostages, who have a right to make their will while they are in prison, or are hostages.

V. Foreigners, who die in our dominions, and who may dispose of the effects which they have brought with them, unless in the place of the stranger's domicil successions fall to the exchequer; in which case the right of reprisals would take place, (*jure retorsionis.*)

VI. Such as are condemned to death for any crime, unless the crime import confiscation of goods; in which case the succession belongs to the exchequer.

VII. Simple persons of weak understanding, who cannot be hindered from disposing of their effects, provided they understand what a testamentary disposition means. But, to be certified of this, our pleasure is,

1.) That they can never make a will but judicially.

2.) That the judge's assessors call one or two physicians,

3.) Who shall put to them some rational questions, to enable him to judge of their discernment,

4.) And shall interrogate them in particular to know whether they understand what a will is; also,

5.) If the thought came of themselves to make a will;

6.) Or if it were suggested to them and by whom; also,

7.) If they were told what person they ought to appoint their heir.

The judge shall draw up a state of all the questions, as well as of the answers, exactly as they were

made by the testator, repeating his own proper words, the whole under pain of nullity of the will.

§ 8.

There are some persons incapable of making a will either by nature or by the laws.

§ 9.

Those whom nature renders incapable of disposing of their effects by will, are such as have not the use of their reason, or who are not entirely in their right senses; namely,

I. Furious and fatuous persons, who cannot make a will, even though their curators should consent to it.

They may, however, make a will in the intervals, when they are in their right senses, if they have understanding sufficient of such settlements.

But it belongs to the heir appointed, to prove that the testator had his full senses and reason at the instant that he made his will. To make this proof, the judge must interpose, and use all the precautions prescribed in section 7. for the validity of the will of such whose understanding is weak.

A will made before a man has lost his senses, and completed in the prescribed forms, would remain valid, as well after as before that event, even though the testator, in a furious fit, should declare it invalid, or should tear it, &c.

II. Persons in nonage, who cannot make a will, even though their guardian should interpose his authority.

III. A person who is born deaf and dumb, who cannot make a will, even though he had obtained the sovereign's permission.

But, a) When a man, after having attained the age of puberty, becomes deaf and dumb by an accident, a distinction must be made, if he can write or not.

In the first case, he may make a will in writing,
but

but he must himself present his will in court, and sign it with his own hand; he shall also give in with it a short request or petition.

In the second case, he cannot make a will, not being able to declare his intention neither by writing nor by words; and even though such as are accustomed to converse with him by signs would explain his thoughts, no regard is to be had to it.

There is no doubt, moreover, but if he had made a valid will before becoming deaf and dumb, that will would have been, after that accident, as valid as it was before.

b) A man who is born deaf, without being dumb, cannot make a will, because, being deprived of his hearing, it was not possible that he could understand business.

It would be a quite different thing, if, by an accident, he had lost his hearing after fourteen years of age, and if he declared his last will by writing, or in words.

c) A man who is born dumb, without being deaf, or who, by an accident, loses the use of speech, if he have learned to write, may make a will in writing, as is said above in letter *a*.

One is also reckoned dumb who cannot articulate the words distinctly enough, to make himself understood by the judge.

It follows evidently from what is said, that, d) Nobody can make a will by signs.

IV. Neither are such who are very drunk in a condition to make a will, because their understanding is not entirely free. They ought to blame themselves for having chosen their time so ill for a work of such importance; and the judge ought, in such a case, to refer them to another time, for making their testamentary settlement.

V. A person, in the last extremity, or agony, who

is no longer in a condition to explain his intention in a distinct manner, ought not to be allowed to make a will. But, as it belongs principally to the judges to determine that point, and conscientiously to examine whether the person who wants to make his will be in such a situation, they shall carefully observe what is prescribed above, in section 7. and shall have always, on those occasions, their oath and their duty before their eyes.

When the judges shall not think convenient to receive testamentary settlements of persons who are extremely weak, and whom they cannot perfectly understand, they cannot be made answerable for it, because the testator ought to blame himself for having deferred till extremity.

§ 10.

The civil laws declare incapable of making a will,

I. Prodigals or squanderers, (*prodigos*), who, by decree of the judge, have been interdicted, and consequently deprived of the administration of their effects, who cannot make a will, even though they should do it in a rational manner.

But, if a prodigal had made a valid will before being interdicted, that will would be valid after interdiction as well as before. Neither is there any doubt but he would have a right to make a will afterward, if the interdict came to be taken off.

II. Such as have committed a crime inferring confiscation of goods; for example, the crime of high treason, (*crimen perduellionis*); in which case a will, made even before the crime was committed, would be invalid. See above, § 7. n. 6.

The same would be the case with respect to the wills of such whom the reproaches of their own conscience, on account of such a crime, shall induce to take away their own life.

III. Ecclesiastics and religious, or monastics, who, according

according to the statutes of their order, acquire every thing to their chapters or convents. But if these ecclesiastics make any acquisitions by preaching, by teaching, by saying mass, &c. they may dispose of them by will.

And that such as enter into religious orders may not deprive their natural heirs of their effects, and to hinder their successions from falling into mortmain, (*ad manus mortuas*), we have ordained, once for all, that no religious can give to his order more than 500 rix-dollars. For this purpose all that such a religious possesses beyond that sum, or which he shall acquire afterward by successions, shall be put into a capital sum, and delivered to his heirs without will, they giving security, on their part, that they will pay him, during life, the interest at five *per cent*.

We have also enacted, and ordained in general, with respect to other ecclesiastics, who do not acquire to their communities or chapters, and who reserve the liberty of disposing of all their effects by will, that none of those who enter into a chapter or ecclesiastic community, can leave to it by legacy above the sum of 500 rix-dollars, nor give to it any greater sum by a deed taking place during his life; if the chapters or ecclesiastical communities receive more, under any pretext whatsoever, they shall restore all that they have received to the heirs without will, and shall pay the double to the exchequer.

This shall likewise be observed with respect to churches and communities for pious uses, of what religion soever they be.

IV. Apostates, who from Christianity go over to Paganism or Judaism. We, by no means, reckon apostates such as from the Protestant religion go over to the Roman-Catholic religion, nor such as from Roman Catholics turn Protestants, who have a right to dispose of their effects by will.

V. Heretics,

V. Heretics, who do not profess any of the three religions tolerated in the empire, or whom none of those three communions will acknowledge for members of their church.

VI. Such as, by way of punishment (*in pœnam*), are deprived of the liberty of making a will; for example,

1.) Such as have been condemned for intending, by public and defamatory writings, to take away any one's honour and reputation.

2.) Such as have poisoned any one, or attempted to take away his life by poison.

3.) Such as have committed incest, or,

4.) The crime of sodomy,

§ 11.

I. When a man, incapable of making a will, nevertheless makes one, that will is null, even though it were made for a pious use, and even the legacies in it are invalid,

§ 12.

II. It is requisite, in the second place, for the validity of a will, that the testator have declared his inclination freely, and without being induced to it from fear of any violence, or from wicked and unlawful suggestions.

N. 1. All fear is not reckoned a violence, but we only reckon such the fear which affects a man of courage (*virum cordatum*), threatened with strokes, imprisonment, or any other ill treatment hard to be endured.

N. 2. It is supposed that a wife has not made her will freely, when, having been abused by her husband during her marriage, she has nevertheless disposed, in his favour, of all her succession, or of a great part of it, to the prejudice of her own relations; which would be presumable, especially if she had made this will in her last sickness.

But

But we cannot reckon as fraudulent suggestions the good behaviour of a husband to his wife, nor the caresses which determine her to make a will in his favour.

N. 3. It cannot be reckoned as a free will of a testator which is suggested to him by the judge; for example, if a judge ask a testator, whether he does not intend to make Caius his heir, or whether he does not intend to leave him 100 rix-dollars in legacy.

But a will shall not be reckoned suggested, when the testator having named his heir or legatee, the members of court, who receive his settlement, shall make him repeat it, as not having well heard the name of his heir, or the *quantum* of the sum left in legacy. The same shall be the case when the members of the court shall be satisfied with asking him in general, whether he does not intend to leave something to his relations, or to his servant.

N. 4. A will not freely made, and which owes its existence to fraud, to fear, or to any violence, is null in law, and neither pious uses nor legatees can receive any thing by virtue of such a will.

A person who shall oblige a testator by wicked suggestions, or by any violence, to make a will, shall be criminally prosecuted.

N. 5. A man who shall borrow another's name, and who shall make a will under that name, shall be condemned to the wheelbarrow for the rest of his life.

N. 6. A person who has suggested to a testator the settlements which he has made in favour of his heir or legatee, shall be bound to pay out of his own proper effects, to both, what they shall have to claim by virtue of the suggested will; but the will itself cannot subsist.

§ 13.

III. We require, in the third place, in order to the validity

validity of a solemn will, that it be made judicially, or presented in court. For, on account of the reasons alleged in the introduction to this second part, we have entirely abolished, by these presents, all private wills, which, till this time, were made before seven witnesses, mostly by ignorant notaries, or by ministers, by procurators, and by vagabonds unskilled in the law.

§ 14.

It is not necessary that the will be made before the testator's ordinary judge : all judges, who have a voluntary jurisdiction, (*voluntariam jurisdictionem*), having a right to receive testamentary settlements from any person whatever.

§ 15.

There must be three members of court, at least, present at the making or presenting of wills.

§ 16.

In places where there are regencies, our will is, that two counsellors be present at this act, with the protonotary, or secretary.

§ 17.

And, in great towns, two members of the magistracy, who understand law, shall be present at this act, together with the secretary, recorder, or clerk.

§ 18.

With regard to little towns, where there are none but the burgomaster who understand law, they shall admit to this act a senator of learning, if there be any, together with the secretary of the town, or the recorder. But if the burgomaster do not understand the law, and there be no judge thereabouts, the burgomaster shall admit a notary jointly with the secretary of the town.

§ 19.

§ 19.

In bailiages the justice (*justiciarius*) shall proceed, with the bailie, to the making or receiving the wills of peafants, and other persons who live in the country, calling to them a notary, or, if there be none in the neighbourhood, the pastor, with the mayor or a sheriff*.

§ 20.

In places under the jurisdiction of the nobility, the justice, (who ought to perform all the functions of a judge, when the lord does not understand the law), or the lord himself, shall proceed to this act, with the assistance of a notary, with the pastor or mayor of the village.

§ 21.

In universities, two professors of law should be named to proceed to this act jointly, with the syndic or secretary of the town.

§ 22.

All other wills which shall not be made judicially, and consequently are but private wills, shall be null in law, even though they shall be written entirely with the testator's own hand, because private wills are not made with all the precautions contained in title III. which we have judged necessary for obviating all kinds of frauds. It may be alleged against this regulation, that it is not easy, in pressing cases, or in the country, to assemble such a court; so that, by the establishment of such a regulation, several persons are indirectly deprived of the power of making a will, which does not appear equitable. But we shall not suffer ourselves to be dazzled by this difficulty, if we consider,

* It is not improper here to observe, that the French names of officers and magistrates, when translated, do not always apply to persons in like office with us. This will appear by consulting the words *sheriff* in Johnson's Dictionary, and *eschewin* in Chambaud.

a) That, in a pressing case, it is equally, and even more difficult, to assemble seven witnesses, as is requisite by the common law, even for the wills of peasants.

b) That the testator ought to blame himself for not thinking of making his will at a proper time, while he enjoyed good health, and for having delayed it till his last extremity.

c) That, to avoid presumptions of fraud, suggestions, and collusions, &c. the public interest requires that wills be made or received by public persons, and knowing in the law, rather than by ignorant notaries, or by interested or passionate ministers, or by vagabonds, who, by the confused and injudicious deeds which they draw up, engage heirs in a multiplicity of law-suits.

d) Neither can this regulation be esteemed contrary to equity, if it be considered, that, when a man dies intestate, his effects fall among such as the laws of nature and family-right (*jus familiæ*) call to the succession.

§ 23.

IV. For the validity of a solemn will, it is, in fine, requisite, that the testator observe the solemnities prescribed in the following title.

§ 24.

Any person who can acquire property, may also make acquisitions by will, unless our laws declare him incapable of it. See below, title IV.

§ 25.

What makes the object of a testamentary settlement is the testator's whole succession, which comprehends all the rights and all the effects of the defunct: whence it follows, that a man who has not a penny, and who leaves only debts, may nevertheless make a will, because he may have other rights of which he has power to dispose; for example, he has

a right to regulate what concerns the guardianship of his children.

§ 26.

Wills, moreover, may be written on any sort of stuff: for example, on paper, on parchment, on silk, &c.; and even though there were something written on one of the sides of the paper, the will would not be vitiated thereby.

But it is requisite, on pain of a fine of ten rix-dollars, that the will be on a sheet of stamped paper, or that the will be wrapped in a sheet of stamped paper, or else that it be noted, that, when the will was made, there was no stamped paper at hand; and, in this last case, it shall be sufficient to pay the stamp at the time of the publication of the will.

§ 27.

There may be several original copies made of one and the same will, which shall be all authentic. Wherefore, if one happen to be lost, it shall be sufficient to produce the other, which shall bear faith, if it have other requisite conditions. If all the wills were lost, recourse must be had to the records of court, to which full credit is to be given.

§ 28.

Two persons may make their will on the same sheet; which often happens between husband and wife. In this case it is sufficient to use the solemnities or formalities requisite for one single will, when the two wills are made and ended all together, (*uno contextu*), without interruption, and without entering upon other affairs. See the following title.

§ 29.

The testator is allowed to set down in writing his testamentary settlements in any language whatever, provided he do not use hieroglyphical characters. He

may also use ciphers to mark numbers; but, when he declares his last will by word of mouth to the judge, he must express himself in a language which the judge understands.

§ 30.

We shall treat of the methods of annulling or invalidating a will in title XVII.

T I T L E III.

Of the solemnities or exterior formalities which ought to be observed in the making up a judicial will.

WE have observed in the preceding title that the laws require certain solemnities or formalities in order to the validity of a will.

§ 1.

These solemnities or formalities are either exterior or interior (*extrinsecæ vel intrinsecæ*). The first regard the exterior form of wills, and the way of making them. The others concern the testamentary settlements themselves, and require that children be not omitted, but that they be necessarily, and by name, appointed heirs, or disinherited. We shall treat of the first in this title, and of the last in the title following.

§ 2.

As a judicial will may be made in two ways; namely, 1.) By declaring by word of mouth one's testamentary settlements before a judge, or, 2.) By presenting in court a will made in private, and taken down in writing; every person shall be bound to observe, in each of these two ways of making a will, some solemnities or particular forms which are to be pointed out in the following articles.

ART.

A R T. I.

Of the solemnities or exterior forms which shall be observed when a person wants to make by word of mouth his testamentary settlements before a judge.

§ 3.

WHen a man wants to make his will judicially by word of mouth,

- 1.) He shall give the judge proper warning, and shall acquaint him with his intention of declaring to him his last will.
- 2.) The court shall be composed of three persons, as has been already ordained above, who shall be brought together for this deed, and shall suffer no other person in the court-room.
- 3.) The secretary or clerk shall mark on the protocol or register the testator's name, his surname, his domicil or residence, and the date of his appearance in court.
- 4.) When the testator is young, the judge shall inform himself exactly of his age; and if it be a woman who has a husband, or a minor under age, or a person of a weak understanding, the judge must observe the precautions prescribed above, in title II. § 7. and 10. The judge shall examine with care the state of a person who is weak in understanding, and ask in particular of those who want to make a will, whether fear, force, or any criminal or dangerous inducement have any share in the settlement which they are about to make.
- 5.) The secretary or clerk shall keep a record of all the questions put to the testator, and of his answers, which shall be taken down in writing in the very terms which he shall use.

6.) The

6.) The testator shall afterward declare plainly and distinctly what is his last will, and especially who is to be his heir.

If he do not explain himself distinctly enough, the judge may put to him the necessary questions for understanding his intentions, observing always to take down in writing the very expressions which the testator shall use.

7.) When the protocol or record is ended, it shall be read word by word to the testator, and at every article he shall be asked whether it contain his last will. Moreover, the record ought also to bear that this method has been observed.

8.) The three members of court who shall receive the testator's declaration, shall all three sign the record.

9.) If the testator can write, he shall also sign the record, or shall put his mark to it, which the members of court shall attest by their subscription to have been put there by the testator.

When the testator is not in a condition to put his mark to it, the subscription of the members of court shall be sufficient.

10.) It is not necessary that the seals or *cachettes* of the members of court be affixed to it.

11.) The deed concerning the declaration of his last will ought not to be interrupted by any other deed or extraneous affair, but ought to be passed all together, (*uno contextu.*) See below.

When one of the three members of court is obliged to retire for any necessity, or on account of any indisposition, the whole deed shall be suspended till he return, or till another member of court, or else a notary be called.

When the three members of court cannot be brought together on the same day, or shall separate without finishing the act, the testator shall declare the next day

all

all his testamentary settlement, and shall make a new will, which alone shall be valid, even though it should contain settlements different from those which he had made the day before.

If the testator happen to die in the time that he is declaring his last will, and before naming his heir, the will shall be invalid, and the heir at law, or without will, shall not be obliged to pay the legacies which the testator had already made : but if he have named his heir, the will shall be valid with respect to all that he has really disposed of.

12.) The ingrossed or principal copy of the will shall be made by the judge upon the record ; and if the testator want a copy of it, it shall be furnished to him by the judge, who, moreover, ought always to give the testator a certificate, from whence it may appear that his will has been received in court.

§ 5.

When the heirs at law, or without will, shall deny that all the requisite solemnities have been observed, they shall not be heard against the tenor of the record, (*contra fidem protocoli*), to which credit is to be given, even though one of the members of court should offer to swear to the want of the solemnities.

Neither shall the members of court be obliged to swear to the truth of the record or protocol.

§ 6.

A will shall be equally valid, whatever order one observes in it in disposing of his effects. A man may, for example, begin with the legacies, and end with the appointment of his heir.

§ 7.

When the ingrossed copy of the will shall happen to be lost, the judicial record shall continue to bear full faith, (*plenam fidem*), even though all the members

bers of the court who have received the will should be dead.

§ 8.

The members of the court shall not reveal any thing of the contents of the settlement, either directly or indirectly, on pain of deprivation; and our will is, that the chief judges in courts of judicature strongly recommend secrecy to their colleagues, and make them sensible of the dangerous consequences of their indiscretion.

§ 9.

As it may happen that a person who wants to make his will may be hindered by sickness or some other cause, from personally appearing in court, he shall be at liberty, 1.) To require the judge by a petition, or if the case be extremely pressing, (*si periculum est in mora*), by a servant, or other person, to come to his own residence, there to receive the declaration of his last will.

2.) The chief judge shall depute in this case three members, as mentioned above, to receive this declaration.

It shall not be sufficient then that a testator, of his own authority, cause to be called three members of a court of judicature, and in their presence declare his last will.

3.) The deputies of the court ought to have the testator before their eyes, that they may know him very distinctly; if he be sick and in bed, and it begin to turn dark in the room, they shall cause lights to be brought, draw, if it be necessary, the bed-curtains, and take, in a word, all necessary precautions to prevent their being imposed upon.

4.) These deputies shall likewise exactly observe all the precautions and solemnities prescribed above, § 3. n. 5. and following. They shall particularly take
care

care to put out of the room the wife, the children, and the servants of the testator.

ART. II.

Of the solemnities or exterior forms to be observed in wills presented in a court of judicature.

§ 10.

WHen a testator shall desire that his testamentary settlements be not known, it shall be allowable for him to present in court his will made up and sealed; and in this case it is also requisite, that at least three members of court be present at his exhibiting it.

2.) The judge ought to interrogate testators on the circumstances enumerated above, § 3. n. 4. and draw up a record or protocol of them.

3.) He must especially ask the testator whether he have appointed an heir; and if he have not done so, the judge shall not receive the will, but shall return it to the testator.

4.) The judge must also inform himself from the testator, whether he have written and signed the will with his own hand, in which case it shall not be necessary to open the will, and to read it to him.

5.) But if the testator, not having written the will, have only signed it, and his testamentary settlement have not been read to him before, (on which he shall be particularly interrogated), the judge shall open it, and read it to him article by article.

6.) In both cases the judge shall put a cover about it, and shall seal it with the seal of court.

7.) He shall also mark on the cover besides the date of presenting the will, and the testator's name, that the cover incloses his testamentary settlement.

8.) All the three members of court shall put their subscriptions below,

9.) And shall give the testator a certificate that his will is received.

§ 11.

A will must be presented by the testator himself, and shall not be received from his trustee, even though the trustee have special powers, or should produce a letter or petition written by the testator; consequently our will is, that a testament presented in court by any other than by the testator himself be of no avail.

When two testators make their will in one and together, they must both personally present it.

§ 12.

As it often happens that a person who wants to present his will in court is prevented from doing so by sickness, or other causes, it shall be allowable for him to require the judge to come to his own house to receive the will; in which case, nevertheless, all the forms prescribed in § 10. and 11. must be observed.

§ 13.

When the exterior solemnities which have been prescribed in the preceding articles are not observed, the will shall be null, even with respect to the legacies, and even though the will were made in favour of a community for pious uses, or of a sovereign, (*in favorem piæ causæ vel principis.*)

When the court of judicature shall not observe the prescribed solemnities, and the omission of these solemnities shall cause the will to be annulled, the members of court to whom any fault can be imputed shall be made answerable for it *in solidum*, both to the heirs named, and to all such as might have had any thing to receive in virtue of the will, if these solemnities

nities had been observed. If they be not solvent, they shall be dismissed from their office, or punished in some other manner.

§ 14.

In fine, to avoid all suspicion of corruption or collusion with such as are interested in the testator's succession, we discharge judges to exact any thing for perquisites above what is regulated by the rate of the charges of courts: any one who shall take more, supposing even he had not demanded it, and this surplus has been offered him willingly, shall be obliged to restore the quadruple to the exchequer, and shall besides be dismissed from his employment.

TITLE IV.

Of the interior solemnities of wills, namely, of the nomination of an heir, and, in particular, of the obligation to nominate and appoint for heirs children and parents.

(De institutione heredum, et speciatim liberorum et parentum.)

§ 1.

AFTER treating, in the preceding title, of the exterior solemnities of wills, we must proceed to the interior solemnities essential to the validity of a will.

§ 2.

Among these interior solemnities are reckoned, 1.) The obligation of nominating an heir, and particularly that of parents, who ought necessarily and by name to appoint their children their heirs; or, 2.) Disinherit them. We shall treat in this title of the nomination

mination of an heir, and in the following of disinherison.

§ 3.

The nomination and appointment of an heir is so essential to a will, that it cannot subsist without it.

§ 4.

The appointment of an heir is the declaration which the testator makes, that such an one whom he names shall be his heir after his decease.

§ 5.

This declaration or nomination of an heir, (*institutio heredis*), is either a first nomination, (*prima*), when a first heir is nominated; or a second nomination, (*secunda*), when a second heir is named, in case the first cannot or will not be heir. This is what is otherwise called a substitution, which is further distinguished into direct and in trust, (*in directam et fideicommissariam.*)

We shall treat of the first nomination in this title, and of the second in title VII.

§ 6.

The nomination of an heir (*institutio heredis*), is either voluntary, (*voluntaria*), or necessary, (*necessaria.*) We shall treat of the first in article I. and of the second in article II.

A R T. I.

Of the voluntary nomination of an heir.

(*De institutione heredis voluntaria.*)

§ 7.

Voluntary nomination of an heir is that by which the testator names and appoints as his heir, according

according to his own pleasure, a person to whom he wants to leave his effects.

§ 8.

All mankind in general may be appointed heirs, and there is no exception but with regard to such as the laws exclude from successions.

§ 9.

Those who cannot be appointed heirs (*a testamenti factione passiva excluduntur*) are,

1.) Such as have been proscribed, or whose effects have been confiscated for any crime.

2.) The apostates and heretics, mentioned above, book VI. title III. § 7. and book VII. title II. n. 4. and 5.

3.) The children of such as have been guilty of high treason; our will is, nevertheless, that when they leave daughters, a portion be appointed for them;

And that the grandsons of persons guilty of high treason may be appointed heirs.

4.) Colleges not approved, such as those which have not obtained a privilege for their establishment, and which we have not confirmed.

5.) Monks who have no property. Wherefore also whatever is left them in legacy, shall not belong to the cloisters, but to the heirs without will. See above, book VI. title II. § 10.

6.) Illegitimate children, who can only be appointed for an ounce, or for a twelfth part of the effects, (*in uncia*), when there is a wife or lawful children.

But when there is no wife or lawful children, a father may leave his whole fortune to his illegitimate children.

7.) Children procreated in adultery, or incest; that is to say, from a carnal correspondence between persons related within the forbidden degrees; which children cannot even be appointed heirs for an ounce; but they

they may leave in legacy to them an aliment for their subsistence, because, independent of any testamentary settlement, maintenance is due to them, and ought to be given them, though it had not been left them by will. See part I. book II, title III. § 66.

8.) A man or a woman who marry a second time; who cannot be appointed heirs by the defunct's spouse for a greater share than that left to the child of the first marriage who has the smallest portion. See part I. book II. title III. § 10.

9.) We have observed that there are some persons who often give their whole fortune, or at least a great part of it to religious communities, to cloisters, to churches, or to other pious institutions, and who consequently deprive their relations and the public of their succession. We also have discovered that weak minds are often induced to make such settlements on deathbed, being solicited so to do by the suggestions of clergymen, and by their terrifying dying persons; which intending to prevent, we have ordained by an immediate resolution, that no person can leave to a religious, to a cloister, to a church, or to any other pious institution, of what religion soever, more than five hundred rix-dollars under any title whatsoever, by appointment of an heir, by a legacy, or by a deed taking place among the living, (*per actum inter vivos.*)

10.) When a man who is at law with his relations, or with other persons on account of their effects, shall appoint us his heir, we will not take advantage of that nomination, but, renouncing by these presents such successions, the natural heirs may continue the prosecution of the suit against the defunct's adversary.

§ 10.

It has been shown above, that in order to be appointed heir a person must be capable of receiving by will. It must be carefully observed on this head, that the capacity must be found in the heir, not only at the time

time of making the will, but also at the time when the heir may take possession of the succession. This capacity ought to be found in the first case, because otherwise the nomination of heir could not subsist; and in the second case, because otherwise it could not have any effect.

The nomination of an heir shall not be invalidated on account of incapacity, if that incapacity of being heir only existed in the interval between the making of the will and entering on the inheritance.

§ II.

The Roman laws had laid it down as a principle, that no person could die partly testate and partly intestate, (*pro parte testatus et pro parte intestatus*); that is to say, no body could dispose in his will of a part of his fortune, and leave the other part to his heirs succeeding without will.

This rule is, in effect, founded on the definition of a will, which as it supposes that the testator in it disposes of all his fortune, would infer a manifest contradiction, if the testator disposed in it only of a part of his fortune; and for that reason the Roman laws have introduced the right of accretion, (*jus accrescendi*), by virtue of which the heir's share who does not succeed falls to his coheirs.

Nevertheless, the Roman laws themselves have already given several limitations to the rule; they allow, for example, a soldier to leave a part of his fortune in his military will.

In the Roman law likewise are found several cases, in which, by a series of circumstances (*ex post facto*), it happens, that a testator dies partly testate, and partly intestate; for example,

1.) When the will is invalidated by an objection or complaint of undutifulness, (*per querelam inofficiosi testamenti*); for in that case nothing but the nomination of

of heir falls, and the legacies and other settlements subsist.

2.) When a disinherited son raises an action against two nominated heirs, and gains his cause only against the one; in this case the son succeeds intestate, and the other heir succeeds by virtue of the will.

3.) When a testator institutes for his heir on the one side one of his own brothers, and on the other an infamous person, the brothers omitted succeed intestate to the share of the infamous person, and the brother appointed heir succeeds by virtue of the will.

4.) When a father who has seven children disinherits one of them, and appointing the other six for his heirs, the disinherited child gets the will declared undutiful; he succeeds intestate to the seventh share of the fortune, namely, to the share which he would have had if the father had died without making a will, and the other children succeed to their father's fortune by virtue of his will.

§ 12.

These different limitations which the Romans have been obliged to make in the rule induce us to abolish the rule itself, and to enact, as a constant and inviolable law, that when a testator shall appoint an heir for a share of his fortune, for example, for the sixth, or three fourths of his effects, &c. (*in sextante, dodrante*), and not simply for a certain thing, (*in re certa*), the will and nomination of heir shall be valid, so far as shall concern that share of the inheritance, and the other shares shall return to the heirs intestate.

§ 13.

But if one be appointed heir for a certain thing, (*in re certa*), the person appointed shall be reckoned only a legatary, who ought to be satisfied with the thing allotted to him, and the nomination of heirs failing, the succession shall devolve to the heirs intestate.

N. 1.

N. 1. When a testator, appointing several heirs, shall allot nevertheless to each only certain things, (*instituti in re certa*), they shall be reckoned legataries; and the nomination of heir being null, the succession shall fall to the heirs intestate, reserving the legacies, (*salvis legatis*). Observe, that the debts must be deducted from these legacies.

N. 2. When a testator shall appoint one person for a certain portion of the inheritance; and another, for example, for a sixth of the fortune; the first shall only be reckoned a simple legatary, and the other testamentary heir, but only for the share to which he was appointed; and the surplus of the succession shall return to the heirs intestate.

N. 3. When the testator shall appoint one for a certain thing, and another for a certain share of the succession, and a third as heir purely and simply, the first shall be reckoned a legatary, the second heir for the portion allotted (*partiaris*), and the third heir for the other shares of the inheritance.

§ 14.

When several heirs are appointed, not for a certain thing, but for a certain share of the succession, a threefold distinction is to be made. Namely, 1) Where those portions make together the whole of the succession; 2) Where those portions make more than the succession; 3) Where those portions make less than the whole.

In the first case, each heir shall receive what is allotted to him, and the succession will thereby be entirely divided.

In the second case, shall be deducted from each, proportionally to his share, what was assigned more than the whole of the succession; and,

In the third case, the heirs intestate shall succeed

to the share of the succession of which the testator has not disposed.

§ 15.

When a testator shall appoint some of his heirs for certain shares, (*in certis portionibus*), and shall name others purely and simply his heirs, three cases must likewise be distinguished, and examined: a) Whether the shares assigned exceed the whole of the succession; or, b) Whether they equal the whole; or c) If all together do not make up the whole.

In the first case, the succession shall be divided not into twelve, but into twenty-four portions; and such as have been appointed for certain portions shall receive of these twenty-four portions such as have been allotted for them, and the portions which shall remain shall fall to those who are heirs purely and simply.

In the second case, the succession shall likewise be divided into twenty-four portions, of which the half shall belong to those who have been appointed for certain shares, and the other half to the pure and simple heirs or heirs in general.

In the third case, those to whom certain shares are appointed shall receive those appointed to them, and the surplus shall be divided among such as are appointed purely and simply.

§ 16.

In order to give the necessary explanations concerning the shares of the succession mentioned in the preceding sections, it must be observed, that, according to the laws, an inheritance or succession is divided into twelve parts, which are all comprehended under the name of *as*, a pound weight, and are called *ounces*, *uncie*; two ounces make what is called *sextans*; three, *quadrans*; four, *triens*; five, *quincunx*; six, *semis*; seven, *septunx*; eight, *bes*; nine, *dodrans*; ten, *dextans*; eleven,

ven, *deunx*; and twelve, *as*; twice the *as*, or twenty-four ounces, *dupondium*; and thrice the *as*, or thirty-six ounces, *tripondium*, &c.

Observe, that, if a testator assign to his heirs more than twenty-four shares, the succession must be divided into three *as*; that is to say, thirty-six ounces, (*tripondium*). For example, a testator assigns fifteen shares to one of the heirs, and sixteen to another, appointing a third purely and simply, without determining a share for him; in this case the testator is reckoned to have intended to divide his succession into three *as*, (*tripondium*), or thirty-six ounces, of which the two first are to receive thirty-one ounces, and the pure and simple heir, or heir in general, the five ounces remaining.

§ 17.

It has been shown in § 11. that the right of accretion was introduced on account of the rule which the Roman laws had established, *that no person could die in part testate and in part intestate*: for, to support a will, they ought to have decreed, that, when several heirs are appointed, and one of them does not succeed, his share shall fall to his coheirs.

These laws have distinguished three cases, corresponding to the three ways in which heirs may be joined in a will; for they may be joined by the inheritance, or by the subject only, (*re conjuncti*), or solely by the expression, (*verbis conjuncti*), or at the same time by both, (*re et verbis conjuncti*.)

Heirs were said to be joined by the subject, (*re conjuncti*), when the testator left the succession wholly to two heirs, and called them to it only by distinct expressions, summoning them separately; for example, when he made his will thus: *Caius shall be my heir; Seius shall likewise be my heir*.

They were called joined by the expression, (*verbis conjuncti*),

conjuncti), when the testator left his succession to two heirs jointly, and by equal portions; for example, when he said, *Caius and Seius shall be my heirs by equal portions*. They were called joined by the thing, and by the expression, (*re et verbis conjuncti*), when the testator said, *Caius and Seius shall be my heirs*.

The question was then to know, whether the right of accretion took place in these several cases; that is to say, whether, when one of the heirs does not succeed, and his share is consequently vacant, it falls to the other heirs.

Experience has shown how various the opinions of lawyers have been on that head, and how many law-suits those subtilties have occasioned, especially when some of the heirs were joined by the thing, while others were so by the expression, and others by the thing and by the expression at the same time. This is the reason which induced us, after having deliberately weighed the inconveniencies arising from it, entirely to abolish the right of accretion, and to ordain, once for all, that, when one of the heirs appointed jointly shall not succeed, his share shall belong always to the heirs at law, or heirs intestate, and not to the co-heirs.

Whence it follows, that the rule mentioned in § 11. namely, *that no person can die partly testate and partly intestate*, thereby falls of itself.

We have found it the more necessary to abolish those subtilties out of our laws, which have occasioned so many difficult and nice law-suits, on one side, because the right of accretion had formerly been entirely abolished, by the law called *Papia*, and Justinian introduced it anew; and, on the other side, because it is entirely equitable, that when one of the heirs appointed does not succeed, his share should rather fall to those who are called to the succession by nature and by family-right, than to coheirs. Besides, the right
of

of accretion not taking place in contracts, we see no reason why it should be received in testamentary settlements.

§ 18.

The testator ought to nominate distinctly, by his name, the person whom he appoints his heir, and design him so as he may be known.

Thus, when a testator has appointed, as his heir, a man whom no person knows, and who cannot be discovered by any inquiry that can be made, the will thereby falls, and the succession goes to the heirs intestate, or heirs at law.

§ 19.

When a mistake is made in the very person of the heir, the nomination of heir cannot subsist; but, if the mistake were committed only in his name, or in his quality, or addition, it is valid.

§ 20.

When a testator does not himself name his heir, and only answers *yes* to the judge's question, if he appoint Caius his heir, the nomination is null, because it was suggested, (*propter suggestionem.*)

A nomination of heir shall still be less valid, if it refer to a nomination which a third party shall make of the heir; for example, if a testator appoint for his heir the person whom Caius shall name for that purpose.

§ 21.

Neither shall a nomination of heirs be valid, if it be made with a view thereby to obtain some advantage, (*captatoria*); for example, if a testator appoint Caius his heir, in case he do him the like, and make him likewise his heir.

§ 22.

§ 22.

An heir may likewise be appointed *sub conditione, die, et modo*. This shall be treated of below, in title XIII.

A R T. II.

Of the necessary nomination of an heir.

(De institutione heredis necessaria.)

§ 23.

THE necessary nomination of an heir (*necessaria heredis institutio*) takes place, when certain persons are necessarily, and by name, to be appointed heirs or else disinherited.

§ 24.

These persons are, 1) Children whom fathers and mothers are obliged to appoint expressly for their heirs, of whatever number or sex they be.

Among children are likewise reckoned,

a) Illegitimate children, who have been legitimated by a subsequent marriage, or by the sovereign's rescript, when the father desires it, and the children consent to it. See part I. book I. title IX. art. I. § 9. n. IV.

b) Children emancipated, when they have not been adopted (*arrogati*) by another.

c) Children who have been adopted by an ascendant, (*adoptati ab ascendenie*), but not those who have been adopted by a stranger. See part I. title IX. art. I. § 12.

d) Adopted children, (*arrogati*), whom the father and not the mother is obliged to appoint heir, as well as those who are adopted by virtue of the sovereign's rescript. See part I. title IX. art. I. § 10. n. 9.

§ 25.

§ 25.

Among children are likewise reckoned, e) Not only children already born, but likewise the posthumous, that is to say, those who are born after making the will; and this is the reason that they are not to be omitted. This ought only to be understood of the posthumous children who at the testator's death are nearest of kin to the succession; moreover, those who are in competition for it by right of representation are included amongst the nearest of kin.

A man ought consequently to appoint his heirs,
1.) Natural posthumous children, (*posthumos naturales*); that is to say, such as are born after making the will, or after the testator's death.

2.) Civil posthumous children, (*posthumi civiles*); that is to say, those whom the testator legitimated, assumed, or adopted as descendants, after the making of his will.

We have already ordained in part I. book II. title V. what is to be observed when a posthumous child is omitted, because the father, or the agnats, will not acknowledge him.

§ 26.

A mother and a grandmother, but not a father, are obliged necessarily to nominate their illegitimate children for their heirs, or to disinherit them.

§ 27.

3.) Among the persons whom a testator is obliged necessarily and expressly to nominate for his heirs, or to disinherit them, are likewise fathers, mothers, and other ascendants; and we have seen above, book VI. title III. § 8. why they cannot be omitted or passed over in silence. Moreover, this is understood only of fathers and mothers, who are obliged in their turn to appoint their children their heirs, so that no person is obliged to appoint an illegitimate father or grandfather

father his heir ; but it is otherwise with respect to mothers.

§ 28.

4.) Brothers are not among those who must be appointed heirs, except when a testator has nominated for his heir an infamous person, (*turpem personam*.) See below, § 35. title V. § 23. and title VI. § 6.

§ 29.

It evidently results from what goes before, that fathers and mothers cannot pass over their children in silence.

Children are omitted or passed over in silence, when a testator makes no mention of them in his will, and does not appoint them expressly by name for his heirs, nor disinherit them.

It is not then an omission or preterition, when a testator says in his will, *I pass over my son in silence*; nor when he adds the cause, for example, *I pass over my son in silence, because he has joined a band of robbers*.

For in both cases it is a real disinheriting or dishe-
rison; wherefore, in the first case, which contains no cause for disinheriting, the will shall immediately be invalidated by the objection or complaint of undutifulness, (*per querelam inofficiosi testamenti*); but in the last case, which expresses the cause for disinheriting, that cause must be examined, and the will shall be invalidated according to circumstances.

§ 30.

Thus when children have been omitted, the will is null in law, and cannot be valid even in favour of a pious use. We declare likewise by these presents, that we will never use our sovereign authority (*ex plenitudine potestatis*) for confirming such wills; far less will we assume to ourselves such successions, even though we were appointed heirs.

The

The legacies made in such a will shall likewise be invalid.

When the son omitted shall die before the father, and consequently the case of the omission shall not exist at the time of the testator's death, the will shall nevertheless be invalid, because it was null from the beginning.

§ 31.

This rule admits an exception, namely, when the son omitted shall renounce his right of succession, and it shall be clearly proved, either by a declaration made by him judicially, or by a deed written and signed by his own hand.

§ 32.

As children are likewise under the same obligation to appoint their fathers and mothers their heirs, or to disinherit them, it plainly follows, that when they have passed them over in silence, what has been ordained in the preceding sections with regard to the omission or disinheriting of children is to be observed.

§ 33.

It must likewise be observed, that soldiers have a right to pass over their children, or their father and mother, in silence; and that is one of the privileges of the military state, because it is a rule with respect to the wills of soldiers, to regard only the testator's inclination.

§ 34.

Brothers may be omitted, provided the testator does not prefer to them an infamous person; for in this case the will in which the infamous person is appointed heir, is not indeed null; but the brothers may, by an objection or complaint for undutifulness, get the will invalidated as to the nomination of the heir, (*quoad institutionem*); with regard to the legacies

and other settlements of the will, they shall remain in their full force.

§ 35.

When there are no children of the first degree, ascendants, both paternal and maternal, are obliged likewise expressly to nominate and appoint for their heirs their children of the second degree, and those of a more remote degree, or else to disinherit them.

Thus when a father, &c. has disinherited his son for a lawful cause, he must appoint for his heir, or disinherit the son of the child disinherited, even though the latter be still alive at his father's decease.

§ 36.

When ascendants pass over their grandsons in silence, the will is likewise null.

When a grandfather has appointed his son heir, and the latter dies before the testator, the will subsists, even though there be no mention made in it of the grandson, and though he be consequently passed over and omitted; the reason of which is, that the deceased son transmits to his children, by virtue of the family-right, (*jure familiæ*), even according to the laws of nature, all his rights, and consequently that of succeeding to his father's fortune, (*jus succedendi*); whence it follows, that, by virtue of his father's right, (*ex jure patris*), the grandson ought to be held as nominated and appointed.

§ 37.

When a grandfather appoints his grandsons his heirs in the lifetime of their father, passing over the latter in silence, (*præterito patre*), and the son omitted happens to die before the grandfather, it is doubted whether such a will where the son is omitted can subsist? Our will is, from a principle of equity, that the testament be valid, because at the time of the grandfather's

father's decease his grandsons are in reality his nearest heirs.

§ 38.

Grandsons are likewise obliged expressly to nominate, or to disinherit their ascendants; and when the latter are passed over and omitted, the will is null.

Observe on this occasion, that the exception mentioned with regard to the nomination of grandsons in § 37. and 38. have no place here.

T I T L E V.

Of disinheriting of children and of parents.

(De exheredatione liberorum et parentum.)

§ 1.

WE have laid it down as a principle in the preceding title, that fathers and mothers cannot in their wills pass over their children in silence, but are obliged to appoint them their heirs expressly, or to disinherit them, because children are called to the succession of their parents by nature itself.

§ 2.

But as it would be unjust to impose upon fathers and mothers the necessity of appointing their children their heirs, when their behaviour is bad, &c. the laws, after having introduced and allowed wills, and consequently granted to fathers and mothers a power to dispose of their fortune after their death, have thought proper at the same time to restrain that liberty, by enacting, that fathers and mothers shall leave a legitim to their children, and cannot, without very strong reasons, deprive them of it by disinheriton. See book VI. tit. III. § 8.

§ 3.

Disherison then takes place, when in a valid will parents exclude from the legitim expressly by name, and for a lawful cause, their children, whom they would have been obliged otherwise necessarily to have appointed their heirs.

§ 4.

As children cannot be excluded from the succession of their parents but for lawful reasons, we have been pleased expressly to determine here the causes of disinheriting or disherison.

§ 5.

The causes then for which parents may disinherit their children are the following:

I.) When children have laid their hand on their father or mother, and have used violence to them, or caused them to be beaten by others, or advised it to be done. Likewise, when knowing that they were to be abused in that manner, they have not warned them of it.

N. 1. The same shall be the case, when a child has not indeed laid hands on his father and mother, but shall lift up his hand or staff, and shall threaten them with it.

In these cases however the judges shall carefully examine, whether the parents have not abused their children without reason, and whether they have not reduced them to the necessity of defending themselves to get out of their hands, and to escape the stick or whip.

N. 2. Likewise when children have attempted the life of their father or mother, or have given them poison, &c. or have designed to do so.

N. 3. It is also a just cause of disherison, when children have given their fathers and mothers any grievous offence, by abusing them, and calling them
knaves,

knaves, rascals, adulterers, whores, scoundrels, &c. or by cursing them.

N. 4. Likewise when they have accused their father or mother of any crime, or when, in a criminal accusation raised against their fathers and mothers, they have voluntarily offered themselves to depose against them, or when on such an occasion they have become advocates against them. It is the same if they have exhorted, persuaded, or induced any person to accuse their father or mother of a crime, and depose or be advocate against them in such a criminal accusation.

This rule however admits of an exception,

1.) When the children are obliged, by virtue of their office and employment, (*vi officii*), to make inquiry into the crime, and to punish it; for example, when they are judges or fiscals. Nevertheless they have a right to demand other judges or fiscals to be delegated and appointed, for the criminal affairs in which their father or mother is concerned.

2.) When it concerns a crime of high treason or blasphemy, (*de crimine læsæ majestatis tam divinæ quam humanæ*), because duty to God and to our country ought to have the preference of the respect which is due to parents.

§ 6.

II.) When children eighteen years old had not brought their father or mother out of prison, though they had it in their power so to do, and were informed of their situation.

N. 1. This ought to be understood not only of fathers or mothers who have been made prisoners in time of war, but also of those who have been imprisoned for a civil cause; for example, for a debt, for an offence, or for a pecuniary fine.

N. 2. Disherison likewise takes place, not only when

when they will not pay the debt, but likewise when they will not become surety for it.

N. 3. When a father or mother dies in prison, and the children cannot show that they have done every thing in their power to get them liberated, they shall be deprived of their succession, as being unworthy of it; and the succession shall fall to the nearest relations, if, on their side, they have interested themselves in the situation of the defunct, and done every thing they could to get them out of prison. If, being informed of their situation, they have not endeavoured to obtain their liberation, the succession shall belong to the exchequer.

When a stranger shall interest himself in the situation of the prisoners, and they shall be liberated by his aid, by his counsels, and by the assistance which he gives them; if, after their death, he be not fully reimbursed of what he has expended for them, the succession shall be delivered to him: and, when no fault nor neglect can be imputed either to the children or other relations, and for that reason they shall be admitted to the succession, they shall still be obliged to be accountable to that stranger for all he has expended, and for all his damages and interests.

§ 7.

III.) It is likewise a reason to deprive children of the succession of their father or mother, if, being eighteen years old, they have taken no care of them, when they were in poverty, or sick, or infirm, or disordered in their understandings; cares which children ought to take of their fathers and mothers, even in contagious distempers, and in time of pestilence. If they do not so, what has been prescribed in the preceding section shall be observed.

§ 8.

IV.) Another cause of disinheritance is, when children have

have associated themselves with profligate and flagitious persons, to commit-wicked actions with them, or to lead an irregular and infamous life; for example, when they have joined themselves to vagabonds, called *Bohemians*, or to robbers and highwaymen, even though they should not, in fact, commit robbery or murder, or should afterward abandon the gang.

The case would be otherwise, if chance or force had made them fall into their hands. It would be the same when they turn executioners or executioners servants, or procurers, &c. unless the father and mother had given their consent to it, or have exercised the same trade.

§ 9.

V.) Likewise, when children have taken up the trade of comedians or ropedancers, unless the father and mother have consented to it, or have followed the same profession.

Moreover, this cause of disherison shall no longer take place, when the children shall have given up the profession before the disherison.

§ 10.

VI.) Likewise, when a corrupted girl has suffered herself to be seduced, if aged twenty-five years or under, and that, whether the father and mother have endeavoured to procure her a match, or have not given themselves the trouble. The case must be excepted where a suitable match having offered, the father and mother have dismissed him without any valid reason.

This cause of disherison is founded on equity, so much the more, that a girl, or the person who courts her for marriage, has a right, both before and after the age of twenty-five years, when a suitable match offers for her, and the father and mother will not consent to the marriage, to apply to the courts of justice,

justice, that they may, by their office, supply their consent.

Sons may likewise be disinherited, when, to the great scandal of their family and of the public, they spend all their time with whores and odious persons.

§ 11.

VII.) Likewise, when children have married without the consent of their parents. See part I. book II. tit. II. § 18.

§ 12.

VIII.) Likewise, when a son cohabits with his own mother, or with his mother-in-law, or when a daughter cohabits with her own father, or with her father-in-law; in the first case, the father may disinherit his son; and, in the second, the mother is at liberty to disinherit her daughter.

§ 13.

IX.) Likewise when the children prohibit their father and mother to dispose of their fortune by will, or hinder them from so doing; for example, when they hinder the judge from being called when their father and mother demand it, or when they dismiss the judge who had been called at their father and mother's request; if the father and mother happen to be informed of it, and afterward make their testamentary settlement, this behaviour of the children shall be a lawful cause of disinheriting them.

§ 14.

X.) Likewise, when children, leaving one of the three religions received in the empire, go over to Paganism, to Judaism, or to any other religion not tolerated in the empire.

Observe, that, if the child of a Jew turn Christian, the father and mother cannot disinherit him; but they shall

shall be obliged to settle his legitim from the moment he turned Christian, and to deliver it to him.

§ 15.

Children have likewise a right to disinherit their father and mother, and other ascendants, in certain cases, namely,

I.) When the father and mother, or other ascendants, have impeached their children as guilty of a capital crime, or of one which infers a mark of infamy, or when they have accused them of such a crime. The crime of high treason is excepted, as a father who impeaches his son for such a crime cannot be disinherited for that reason.

II.) When the father and mother have given poison to their children, or in any other way made an attempt on their life.

III.) When a father hath been guilty of incest with his son's wife, or a mother with her daughter's husband.

IV.) When a father and mother have hindered their children from leaving subjects by will, of which they might dispose according to the laws.

V.) When the father and mother have made an attempt upon the life of the father, of the mother, of the brother, or of the sister, of the son-in-law, or of the daughter-in-law.

VI.) When the father and mother have abandoned their children when poor, infirm, sick, or disordered in their senses, and have not taken proper care of them.

VII.) When the father and mother have not taken the trouble to liberate their children imprisoned for debts, or made prisoners by the enemy, though they have been informed of their captivity, and were in a condition to extricate them out of it.

Observe that what was prescribed in § 6. preceding,

ding, is to be observed here, especially with respect to the loss of the succession.

VIII.) When the father and mother apostatize, or forsake one of the three religions received in the empire to embrace one not tolerated there.

§ 16.

The causes of disinheritance just enumerated ought to be especially inserted in the will, whether of the father and mother or of the children. And indeed disinheritance is invalid, when the testator says only, *I disinherit my son, for I pass him over in silence*, without alleging the cause which induces him so to do; so that such a will is to be immediately invalidated on an objection or complaint of undutifulness, (*per querelam inofficiosi testamenti*), without examining whether the testator had just causes of disinheritance or not. See above, tit. IV. art. II. § 30.

§ 17.

When a testator has added the cause of disinheritance, and the children deny that it is founded on truth, the heirs appointed, and, failing them, the heirs intestate, shall be obliged to prove the reason alleged.

§ 18.

When the cause of disinheritance cannot be proved, the nomination of heir shall indeed be invalid, and the children disinherited shall succeed intestate; but the legacies, the feoffments in trust, and other settlements, shall subsist, and shall be faithfully executed by the children.

§ 19.

No attention shall be paid to any other causes of disinheritance but those just enumerated, under any pretext whatsoever, even though similar and resembling cases be alleged.

§ 20.

§ 20.

When the father and mother shall be reconciled with their children after the disherison, and shall afterward live with them in good understanding, the disherison shall not thereby be taken off, unless the testator have declared judicially, or by a deed written and signed with his own hand, that he intends the disherison should no longer take place.

§ 21.

Disherison being valid only when there is a just cause to disinherit the children, it follows that posthumous children cannot be disinherited, because just causes of disherison cannot be alleged against them; which ought also to be observed with respect to children who are scarce out of the age of infancy, (*infantia proximi.*)

§ 22.

Moreover, we abolish, by these presents, a kind of disherison, solely founded on the subtilties of the Roman law; namely, that which was regarded as being done with a good intention, (*quæ bona mente fit.*)

§ 23.

We have shown in the preceding title, that one's brother may be passed over in silence; whence it follows, that he may also be disinherited, without alleging any cause for it. And the disinherited brother cannot raise an objection or complaint of undutifulness, but in one single case; namely, when his brother has appointed an infamous person for his heir. See the following title, § 6.

T I T L E VI.

Of the objection or complaint of undutifulness.

(De querela inofficiosi testamenti.)

And of the legitim, (de legitima.)

§ 1.

WE have shown in what cases, and for what causes, the father and mother may disinherit their children, and the children their father and mother, or other ascendants.

When such as have been disinherited maintain that the causes of disinheritance alleged against them are false, and without any foundation, the laws allow them, in that case, the objection or complaint of undutifulness.

§ 2.

The objection or complaint of undutifulness is then an action, by which a person who has been disinherited on one of the causes mentioned in the preceding title, maintains that it is without foundation, and demands consequently that the will in which he is excluded from his right of succession be invalidated, and he be declared heir intestate, or at law.

The complaint of undutifulness differs from the action called *petitio hereditatis*, in this, that the last cannot be raised but when the will is invalidated. The two actions however may very well be combined; and the sentence may bear, at the same time, that the will is invalidated, and that the heir nominated shall be obliged to restore the succession, with all its appendages, (*cum omni causa.*)

§ 3.

§ 3.

When the person disinherited is in possession of the succession, he may use the complaint of undutifulness, by way of objection or exception to the demand made on him by the appointed heir of the succession.

§ 4.

The objection or complaint of undutifulness is allowed to those, who, by our laws, ought to be necessarily and expressly appointed heirs, or disinherited, when they pretend that it is without cause, and without fault of theirs, that they have been excluded from their right of succession. The causes of disinheritance have been treated of in the preceding title.

§ 5.

Those who can raise the objection or complaint for undutifulness, are, 1.) Sons or daughters, grandsons and grand-daughters; and, 2.) The father and mother, and other ascendants, both on the father's side and mother's side, when they have been disinherited without a lawful cause.

§ 6.

With regard to brothers, they may be passed over in silence, and consequently disinherited, without one's being obliged to allege any cause of disinheritance: whence it follows, that, in such cases, the objection or complaint of undutifulness does not take place with regard to brothers. See the preceding title, § 23.

N. 1. Nevertheless, when a testator has appointed for his heir an infamous person, (*turpem personam*), the brothers passed over or disinherited, may also, in that single case, raise the objection or complaint of undutifulness, and get the will invalidated.

N. 2. In the third part of this body of law shall be shown, what persons are to be reckoned infamous, (*pro turpibus*).

N. 3.

N. 3. This rule admits an exception in the cases following, namely, 1.) When brothers omitted are themselves infamous persons ; or, 2.) When they have shewn themselves ungrateful to the testator, or, by their fault, have lived in enmity with him ; because ingratitude infers in it a kind of infamy or turpitude, (*speciem turpitudinis*).

N. 4. Moreover, it is requisite, that the appointed heir's infamy have preceded the claim of disinheritance ; for, if he had afterward become infamous, the complaint of undutifulness would not be admitted.

N. 5. The brothers omitted or disinherited, who maintain or affirm the infamy of the heir appointed, are obliged to prove it.

N. 6. When the testator has appointed for his heir an honest person jointly with the infamous person, the will can be invalidated only in part.

N. 7. When the brothers omitted or disinherited die before the testator, they do not transmit the objection of undutifulness to their children. See § 9.

§ 7.

When several persons are disinherited who are in the same degree of proximity, each may raise for the whole (*in solidum*) the objection or complaint of undutifulness ; for example, when a testator disinherits, a) His son, b) And the child of his second son, each of them may demand, by virtue of the complaint of undutifulness, that the will be invalidated, and the succession be conferred on the heirs intestate or at law.

§ 8.

When a will has been invalidated, the person at whose instance that was done, does not succeed alone, but all the other heirs intestate have a right, by virtue of the action called *petitio hereditatis*, to demand their share of the inheritance. See above, § 2. Consequently,

frequently, in the case just mentioned, the son disinherited is obliged, when the will is invalidated, to divide the succession with his nephew.

§ 9.

When the person who has been disinherited happens to die before the will has been opened, or before he has made his complaint of undutifulness, he transmits his right to his heir; which does not take place with regard to brothers. See § 6. at the end.

§ 10.

Lawyers have debated the question, whether the edict concerning successions (*edictum successorium*) likewise took place with regard to the complaint of undutifulness; that is to say, whether, in case a disinherited person will not offer his complaint of undutifulness, or does not offer it at the time prescribed, or when he has offered it has been cast in it, the second heir disinherited, and afterward the third, have still a right to make that complaint?

Our will is, that, according to the common opinion, a distinction be made, whether those who are disinherited be in the same order of succession, (*in eodem ordine successionis*), or if they be of different orders.

The edict concerning successions (*edictum successorium*) does not take place in the first case, but it does in the second.

Thus when, for example, the testator solemnly disinherits, 1.) His son; 2.) His son's children; 3.) His father; and, 4.) His grandfather, it is unquestionable that the son, as nearest of kin, may raise the complaint of undutifulness, which he may do within five years.

But if the son do not raise this complaint within the space of five years, or if he renounce it at first, or if after he has made it, he be cast by a sentence agreeable

agreeable to law, a question is made, whether his children, who after him are the nearest of kin, have likewise a right to sue within the five years to get the will annulled.

Our will is, that they have no right to do so, because they are with their father in the same order of succession, to wit, in the order of descendants, (*in ordine descendendum*), and consequently the deed of persons of one degree of that order is prejudicial to the other degrees of the same order.

It is farther questioned, whether a father, after his son and children have been excluded from the complaint of undutifulness, may raise it by virtue of the right which he has to succeed, (*suo jure*). We say that he has a right to raise that complaint, because the order of descendants cannot prejudice the order of ascendants.

And when a father has neglected to make that complaint, or has been cast in it, it is farther questioned, whether the grandfather has also a right to sue on that complaint. We say, that he has no right, because the persons who are in a degree in the same order are no longer allowed to use it.

§ 11.

The objection or complaint of undutifulness takes place against all those who in such an unjust will have been appointed heirs, be they ascendants, descendants, or substitutes.

But this complaint cannot be made, till the heir appointed have in fact taken possession of the succession.

This complaint takes place also against the heirs of the heir appointed.

§ 12.

The object of the complaint of undutifulness is the

the will in which the demandant has been disinherited.

Among undutiful wills are not reckoned, 1.) The wills of soldiers; 2.) The settlements of a son who leaves by will his camp or supposed camp peculiar. The case would be otherwise if it were a father who disposed of it; for the objection or complaint of undutifulness takes place against a father's will. 3.) When a father substitutes others in place of his infant children, which shall not be extended to a supposed pupillary substitution, (*ad quasi pupillarem substitutionem*.) See below, title VII. art. II. § 16.

§ 13.

The effect of the complaint of undutifulness is, when the cause of disinheritance is not well founded, to invalidate the will as to the appointment of an heir. All the other heads and articles of the settlement subsist.

When the cause of disinheritance alleged in the will is found just, if the demandant prosecute the suit to a final decision, he shall lose all the donations or legacies which otherwise he might have claimed by the will, which shall fall to the exchequer; and he shall besides be obliged to pay the charges occasioned to the heir nominated. The case would be otherwise if the demandant had not quarrelled the settlement itself, and had alleged that it only wanted the necessary solemnities or formalities.

§ 14.

Nothing more is demanded by a complaint of undutifulness but that the will be invalidated, and the succession considered as if it had fallen intestate, (*ad causam intestati*), which alone likewise is to be the subject of the sentence. When the bail shall be thus determined, then only the demandant may raise the action called *petitio hereditatis*. See above, § 2.

§ 15.

The complaint of undutifulness does not take place,

I.) When the person disinherited has any other method (*remedium*) for attaining his right, for example, if he can get the will annulled.

II.) When the person disinherited renounces his right, though he should only renounce it tacitly, for example, by accepting or demanding the legacy made to him in the will; and supposing likewise that he did so only upon protest, and with a reservation of his right. Likewise, when the person disinherited acknowledges as heir him who is called to the succession by the will. In both cases he may nevertheless sue for obtaining what is wanting in his legitim, (*ad supplementum legitimæ.*)

But he does not prejudice his right when it is in another's name, (*alieno nomine*); for example, in quality of guardian, &c. that he sues the heir, and acknowledges him as such, or when he is obliged by authority of the judge to acknowledge him in that quality, or when it is in his father's lifetime, and at his request that he consents to be disinherited.

III.) When the person disinherited remains silent for five years, and has not made his complaint of undutifulness, unless he has not been in a condition to do so, and that it was not his fault, which he must prove.

IV.) When the legitim is left in whole or in part under the title of heir, (*sub titulo institutionis*), both to the children, and father and mother, and other ascendants, which does not regard brothers. See § 20.

V.) When it is a soldier who has made the will, or when the father has made a pupillary substitution to his infant son. See below, title VII. art. II. § 16.

VI.) In fine, the complaint ought to be received, and the will may be invalidated, even though the codicillary clause be added to it.

A R T.

A R T. I.

*Of the legitim.**(De legitima.)*

§ 16.

WE have said above, that children were the own and necessary heirs (*sui et necessarii heredes*) of their father and mother, whose succession was appointed for them by nature itself.

Thus though the laws have allowed fathers and mothers to dispose of their fortune by a testamentary settlement, they have nevertheless used the precaution to ordain at the same time, that they should be obliged to leave to their children under the title of heir a certain portion of their succession, which portion is called *legitim*.

It may be asserted on good foundation, that the legitim is founded on the law of nature, and that consequently children cannot be deprived of it unless the laws allow this to be done for certain important reasons, introduced for the public good, as has been permitted in the military will, and when there are just causes for disinheritance.

§ 17.

Though, according to the law of nature, fathers and mothers do not succeed their children, and be not their own and necessary heirs, (*heredes sui et necessarii*), nevertheless the civil laws have likewise decreed with respect to fathers and mothers, that children might indeed dispose by will of their peculiars, but that they should be obliged to leave the legitim to their father and mother.

§ 18.

The legitim is a part of the share which would fall to children, or to fathers and mothers, if the children, or the father and mother had happened to die without making a will, (*portio portionis ab intestato debita.*)

§ 19.

The legitim ought to be left both to the children by their father and mother, and to the father and mother by their children.

A brother is not obliged to leave the legitim to his brother, but in the case that he have appointed for his heir an infamous person.

§ 20.

But the legitim must be left to the children, and to the parents under the title of heir; that is to say, they must be appointed heirs for their legitim.

It is sufficient that children be appointed heirs for a certain thing, (*in re certa*), or that the testator say, *My son Caius is to inherit only his legitim*. But it is not sufficient that a testator leave his children the legitim under a particular title, for example, of a legacy. The reason of this is, that the will would be invalid on account of the want of a nomination of heirs.

Wherefore it is needless to dispute the question, whether the legitim makes part of the inheritance or of the moveables; nor to mind the subtilties which that question has occasioned, to know the effects that it would have; for it is certain, that the legitim can be reckoned no otherwise than a part of the inheritance, nor be demanded but by the actions concerning inheritance, called *actiones hereditariæ*. See § 28.

As to brothers, it is sufficient to leave them the value of the legitim, even though it were under a particular title of a legacy, (*titulo singulari.*)

When there are four children, or fewer, the legitim

tim consists in the fourth of the fortune, which the children, or the father and mother, might have received intestate, (*quarta portionis ab intestato debitæ.*)

§ 21.

But when there are five children, or more, the legitim shall consist in the half of the effects, (*in semisse portionis ab intestato debitæ*), which the children, or the father and mother, might have received intestate.

Thus when there are four children, or fewer, and the succession shall amount, for example, to four hundred rix-dollars, the portion intestate of each child will be a hundred rix-dollars, of which the fourth, which in the case proposed is twenty-five rix-dollars, will make the legitim.

If there be five children, or more, and the succession be four hundred rix-dollars, the portion intestate of each child will be eighty rix-dollars, and the half of that portion, namely, the sum of forty rix-dollars, will be the legitim in this case.

Among the children also are included those who have been disinherited, (*exheredati*), but not those whom the law excludes from successions, (*lege exclusi*.)

When a man leaves several grandchildren by a daughter, or by a deceased son, and they come in competition with a daughter or a son yet living, all the grandchildren by the deceased son are reckoned but as one child: but when a man leaves only grandchildren, they inherit by heads, (*juxta capita.*)

§ 22.

A testator has no right to do any thing whatever to defraud the legitim; he is not allowed consequently to rate his effects when he pleases; but when the children, or the father and mother desire it, the succession is to be rated by persons of skill; but if the rate which the testator has made be found to be as high,

high, or even to surpass that of the skilled persons, he who demanded the valuation shall be obliged not only to pay the dues for it, but likewise to reimburse all the charges occasioned to the heirs nominated.

§ 23.

Neither is the legitim to be left with burden; for example, of a feoffment in trust or under condition; those sorts of clauses being to be reckoned the same as if they were not inserted in the settlement, (*pro non adjectis*), unless the children, or the father and mother have approved of them, or the clauses tend to their advantage.

§ 24.

The legitim is taken out of the whole succession, as it stood at the testator's decease.

Among the testator's effects are reckoned all that the children, or the father and mother, have received from him, whether in his lifetime, or by virtue of his testamentary settlement. Legacies are consequently included; likewise, what a testator has laid out for purchasing for any of his children a canonry or a public employment. Likewise, the presents otherwise given by him to his children.

School-fees shall not be included in the legitim, because they belong to the education of children, of which the father is to support the charge while he is in life. It would however be otherwise, if the father had expressly ordered to reckon them. As to the expenses of a son's travels, they ought always to be reckoned and imputed in his legitim.

But the peculiars of children (excepting the profectitious peculiar) cannot be imputed in the legitim, for they belong in property to the children, who have them not from their fathers.

§ 25.

For the preservation of the legitim children and heirs

heirs have the action called *petitio hereditatis*, and the other actions concerning inheritance, (*actiones hereditarias*). When they are in possession of the inheritance, they have a right of retention, (*jus retentionis*.)

When they are disturbed in the possession of the legitim, they have the interdicts, *quorum bonorum*; *Remedium*, *l. ult. C. de ed. div. Had. &c.*

When a testator has determined in his will a certain portion to come in place of the legitim, supposing that portion be less than the legitim, the children may raise the action called *condictio ex lege*, and by that means obtain a supplement to indemnify them for what is wanting in the legitim. See above, § 16.

This supplement may be demanded, even though the children, or the father and mother have received, without protest, the share assigned to them, or though they have paid the debts in proportion to the sum left them in legacy, or though the father had forbid exacting any supplement. The case would be otherwise, if the children, or the father and mother had formally renounced that supplement. See above, § 15.

§ 26.

The payment of the portion left in legacy cannot be suspended nor stopped, on pretext of an action raised to obtain the supplement; but the heir nominated ought to be forced to pay by way of execution, (*mediante executione*), even though the testator had ordained, that if the son sued to get the valuation altered, he should be obliged to be satisfied with the portion allotted to him, supposing even it valued at less.

§ 27.

The laws allow likewise those actions to the heirs of fathers and mothers, and of children: and those actions likewise take place against the heirs of the heir nominated.

§ 28.

§ 28.

Those actions by which either the legitim, or only a supplement may be demanded, cannot prescribe till after the space of thirty years.

T I T L E VII.

*Of substitution.**(De substitutione.)*

§ 1.

AS a person who nominates an heir is often apprehensive that the heir will not, or cannot accept his inheritance, or that being yet in nonage he should happen to die before the age of puberty, it is allowable for him to substitute a second heir to the heir instituted or nominated, which is called *substitution*.

§ 2.

Substitution then is nothing else but the nomination of a second heir.

§ 3.

Substitution is either direct or in trust. Direct substitution takes place, when a testator names a second heir, in case the heir instituted will not or cannot be heir. Substitution in trust takes place, when a testator requires the heir appointed, or orders him, to deliver over the succession, after having taken possession of it, to a third party, either at an appointed time, or after his death.

It is supposed then in a direct substitution, that the heir appointed was not heir, and it is supposed on the contrary, in a substitution in trust, that the heir appointed has accepted the succession, and is consequently become heir.

We

We shall treat in this title of direct substitution, and in the following of substitution in trust.

§ 4.

Direct substitution is either vulgar, (*vulgaris*); see art. I.; or pupillary, (*pupillaris*); see art. II.; or supposed pupillary, (*quasi pupillaris*); see art. III.; or military, (*militaris*); see art. IV.

A R T. I.

Of vulgar substitution.

(*De substitutione vulgari.*)

§ 5.

Vulgar substitution takes place, when a testator appoints an heir, and names at the same time a second, in case the first will not be his heir, (*si heres non erit.*)

In the same case is tacitly included this other condition, *if the heir appointed cannot be heir according to the laws.*

§ 6.

Any testator may substitute in this manner to his heir, whether he be his own heir, or a stranger, (*vel suus vel extraneus*); provided the testator be capable of making a will; and the heir substituted may according to the laws be appointed heir.

When several heirs are appointed, one may substitute the one to the other, and say, for example, *I appoint Caius and Titius for my heirs; and if Titius will not be heir, I substitute to him Caius.*

§ 7.

A person may likewise substitute to the substitutes; that is to say, substitute a third heir in failure of the

second, and others also in several degrees. Observe on this head, that a person who is substituted, is so to the heir appointed; which produces these two effects, namely, a) That if the first substitute happens to fail, the second substitute comes in his place, according to the well-known rule, *Quod substitutus substituto fit quoque substitutus instituto*; and, b) That when a testator hath imposed a condition on the heir appointed, the second substitute is equally obliged to perform it.

§ 8.

The condition, *if the heir appointed do not become heir*, exists, 1.) When the heir appointed, whether he be the testator's own heir, or a stranger, renounces the inheritance, and will not accept it, or is incapable of it.

But if the heir appointed have a father alive, and being under his power, the father declare he will accept the inheritance, the heir substituted could not succeed. The case would be otherwise, if the substitute could prove that the testator was ignorant that the heir appointed had still his father alive; in which case the succession shall be divided between the father and the heir substituted.

2.) When the heir instituted dies before the testator, or when being necessary heir, he leaves no children; the reason of which is, that necessary heirs transmit, even according to the laws of nature, their right of succession to their children. The case would be otherwise, if, in a question with a stranger-heir, another heir had been substituted to him by a vulgar substitution.

3.) When the heir appointed has indeed accepted the succession, but is restored to his own place against his own acceptance.

4.) But the condition of the substitution does not exist when the heir appointed dies after the decease
of

of the testator, though before opening of the will. The reason of which is, that having effectually acquired a right by the testator's settlement, he transmits it to his heirs.

5.) The case is the same when the will has been indeed opened, but the heir appointed dies within the time allowed for deliberation, (*intra tempus deliberandi*); for, in this case, the heir appointed transmits the right of deliberating (*jus deliberandi*) to his heirs; and, if they declare themselves heirs, the substitution is ineffectual.

If they do not give their declaration within the space of two months, they shall be reckoned heirs under benefit of an inventory, (*sub beneficio inventarii*), and consequently the substitution shall still be in that case ineffectual.

§ 9.

When the condition exists, the substitute comes in place of the first heir, and consequently succeeds to all the rights which he would have acquired by the will. Thus when the heir appointed was to succeed only to a part of the effects, the substitute cannot require more, even though the coheirs should happen to fail. The reason of which is, that we have abolished the right of accretion.

§ 10.

Vulgar substitution has no effect,

1.) When the inheritance is accepted by the heir appointed, or by his heirs, by virtue of the right of transmission, (*ex jure transmissionis*.)

2.) When the substitute dies before the heir appointed, because the substitute having yet had no right, could not transmit it to his heirs. The case would be otherwise, if he had not been substituted to the heir appointed, but for a certain thing, (*in re certa*.) For in that case he shall be reckoned a legatary, whose

right is acquired from the day of the testator's decease.

3.) When the heir appointed dies during the space for deliberating, before being declared heir, the substitute cannot at first succeed, but he is obliged to wait till the heirs of the heir appointed, to whom the right of deliberating (*jus deliberandi*) is transmitted, have declared whether they will accept the inheritance.

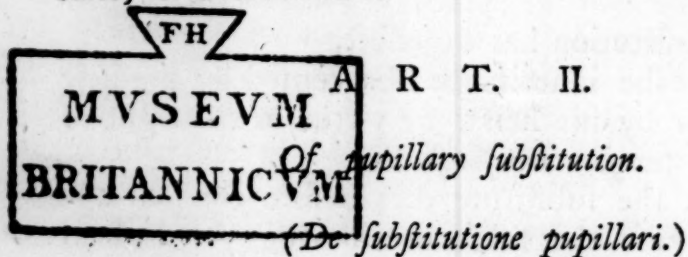
4.) When the condition under which the will is made, does not exist.

5.) When the will itself cannot subsist; for example, when the testator makes another will, and cancels the first.

§ 11.

The Roman laws decree, that the pupillary substitution should be reckoned tacitly included in the vulgar substitution; but that is a subtilty which we entirely abolish by these presents.

Thus when a testator has substituted Caius to his son in nonage, in case his son in nonage will not be heir, or cannot be so, and the son happen to die before the age of puberty, the substitute shall succeed only to the testator's effects, by virtue of the vulgar substitution, (*vi substitutionis vulgaris*), and the proper effects of the child in nonage shall return to his heirs intestate, or heirs at law.



§ 12.

Pupillary substitution shall take place, when fathers and mothers shall appoint or disinherit expressly, by

by name, their children in nonage, and substitute, for example, Caius for their heir, in case these children die before the age of puberty.

Pupillary substitution has this effect, that the substitute succeeds not only to the testator's fortune, but also to that of the minor.

There are none but relations ascending, either on the father or mother's side, who can substitute to pupils, provided always that none but ascendants acknowledged as such by the laws, are to have a right to substitute in this manner. See above.

§ 13.

A pupillary substitution can only be made with respect to children who are necessary heirs, nor is it necessary that they be under the paternal power. The reason of which is, that we no longer regard pupillary substitution as an effect of the paternal power; and that we regard only the quality of necessary heir; that is to say, of an heir who must necessarily be appointed heir or disinherited. Wherefore also mothers and grandmothers shall have a right to substitute to pupils; and, for the same reason, a father shall have right to substitute to his pupil children, who, after his death, come under the paternal power of their grandfather, as well as to children emancipated, unless the emancipated have been adopted by an ascendant, or assumed by any other, (*arrogati.*)

Fathers and mothers have also a right to substitute to the child whom they have disinherited for a just cause, but not to such as they have disinherited unjustly, (*ex injusta causa.*)

§ 14.

That a pupillary substitution may take place, it is requisite that the children, to whom the father and mother substitute in a pupillary manner, be in nonage; for they have no right to substitute in that manner to,
minors

minors, nor to extend the substitution beyond puberty: from this rule are excepted the settlements of soldiers.

§ 15.

The Roman laws have likewise tacitly included vulgar substitution in pupillary substitution. So when a testator has appointed his children his heirs, and has substituted Caius, in case they happen to die before the age of puberty, supposing the child in nonage does not die before the age of puberty, and, being arrived at that age, renounces the succession, and will not consequently become his father's heir; in this case, the heir substituted had a right, according to the Roman law, to accept the inheritance. But, considering that such extensions of the laws are liable to many inconveniencies, our will is, that when, in such a case, the child in nonage shall die after the age of puberty, the whole substitution be ineffectual; and that, when he shall renounce the inheritance, or shall be incapable of it, it fall to the heirs intestate or at law.

§ 16.

It has been already shown that a testator, by a pupillary substitution, disposes not only of his own proper estate, but also of that of his child in nonage, and that the heir substituted succeeds to the fortune of both; wherefore also the father and mother cannot dispose only of their own effects, nor substitute an heir, if they do not appoint or disinherit, at the same time, their child in nonage; which, however, admits an exception as to a military will,

§ 17.

Moreover, there is here but one settlement and one will, of which the father's will is the principal, and the settlement concerning the effects of the child in nonage is only its accessory; this is also the reason that

that the disposition must be made all together, and in one single deed, (*uno actu et uno contextu*), and that a person is obliged only to observe the solemnities requisite for making one single will.

A pupillary substitution is not then valid, when it is made in a particular will, or at another time than when the father makes his own proper will. Moreover, it is allowable for a testator, if he be afraid that the pupil has any thing to dread from the person substituted to him, to add to the settlement of his own effects a sealed note, in which the name of the substitute is to be marked; and, in this case, it is sufficient if, in his will, he declare in general, that he substitutes to his child in nonage, in case he happens to die before the age of puberty, the person whose name he has marked in the sealed note.

§ 18.

On one side there are really here two successions; namely, that of the testator and that of the child in nonage; the first is the principal succession, and the other the accessory; which has this effect, that if the father's will be null, the substitution ceases to have any effect; but the case is not the same, when the will is only invalidated with respect to the nomination of heir; the reason of which is, that the substitution to the father's fortune remains valid.

§ 19.

It is not necessary for the father and mother to begin their will by the nomination of their child in nonage; for they are at liberty to substitute first an heir to their child in nonage, and afterward to dispose of their own proper fortune, provided the whole be done together, and by one single deed, (*uno actu et contextu*); for here there is no regard to the order in which the settlements are written, but to the order itself, in which the succession is to be disposed.

§ 20.

§ 20.

The effect of a pupillary substitution is, that the substitute succeeds when the heir appointed happens to die before the age of puberty.

N. 1. When a father appoints for his heirs two children in nonage, and substitutes Caius to both, Caius cannot be admitted to their succession, unless they have both died before the age of puberty.

If one of the two die before the age of puberty, and the other arrive at that age, the substitution will be ineffectual. The reason of which is, that it is presumed the testator designed to favour his children rather than the substitute.

And even though the son, who arrives at the age of puberty, should not incline to become heir, the substitute would still not be admitted to the succession by virtue of a tacit and vulgar substitution, because we have entirely abolished tacit substitutions.

§ 21.

When the condition comes to exist, the substitute succeeds to all the rights, both of the testator and of the heir appointed, and excludes all the relations to whom the child in nonage, if he could have made a will, might have left the legitim, and the testator had passed over in silence, or disinherited without a cause.

Thus when a father or a mother shall substitute a stranger to their son, passing over their father or mother in silence, the substitution shall not be ineffectual; the reason of which is, that it is not the son, but the father or mother who made the will, and that the father and mother are not mutually obliged to leave the legitim to each other.

§ 22.

The pupillary substitution is ineffectual,

1.) When the heir appointed dies before the age
of

of puberty, which shall be for boys the sixteenth year complete, and for girls the fourteenth.

2.) When a testator adds a certain time to the substitution; for example when he says, *I substitute Caius to my son, in case he happen to die before his tenth year.* In this case the substitution is ineffectual, as soon as the son shall have arrived at ten years of age.

3.) When all the father's will is annulled and made void; that is to say, when it is absolutely invalid. The case is otherwise when it subsists in part.

4.) When the heir appointed, or rather his guardian, renounces the inheritance, and will not accept it: the reason of which is, that a will cannot subsist without an heir.

Nevertheless this rule admits an exception, a) When it is a soldier who has substituted to a pupil, and, b) The child in nonage, to elude the testator's settlement, and in hopes to succeed intestate, will not accept the succession.

5.) When the substitution was made on a condition which does not exist.

6.) When the child in nonage appointed heir dies before the testator.

7.) When the substitute dies before the child in nonage. See above.

8.) When the substitute is cast in an action raised by him, for getting the will of the father of the child in nonage annulled.

9.) When a father, after having made his will, becomes incapable of making a will; for example, when he happens to be proscribed. See above.

10.) When there are two children in nonage, and only one of them dies before the age of puberty. See above.

11.) When the substitute becomes incapable of receiving by will at the time the condition exists. See above.

12.) When the child in nonage is adopted (*arrogatus*) by a stranger, or adopted by an ascendant. See above.

§ 23.

But the substitution is not ineffectual,

a) When the pupil procreates children; which some doctors have regarded as a method to put an end to a substitution, though without foundation: the reason of which is, that such children are always illegitimate. b) When the pupil enters into a convent because he is not capable of making such vows. c) When the pupil is appointed heir jointly with another who has attained the age of puberty, and Caius is substituted to both; for if the pupil happen to die before the age of puberty, the substitution has its effect, even though the other heir should happen to fail.

A R T. III.

Of the substitution which lawyers call supposed pupillary or exemplary.

(*De substitutione quasi pupillari.*)

§ 24.

WHEN a child has attained the age of puberty, and is not in a condition to dispose of his fortune, for example, if he has lost his understanding, or is otherwise incapable of making a will, (see above, tit. II. § 10.), the father and mother, and other ascendants paternal and maternal, have a right to substitute to him an heir, and that is the supposed pupillary substitution, which is usually called exemplary, because it was introduced after the example of the pupillary substitution.

§ 25.

§ 25.

The supposed pupillary substitution figures then the case and condition following; namely, *If the child incapable of making a will, and who has been appointed heir, happen to die while deprived of his understanding, or during any such other incapacity.*

Our will is, that under the supposed pupillary substitution shall not be included other tacit substitutions, for example, the vulgar nor the pupillary; but we decree, that, when the incapacity shall cease, the whole substitution shall be ineffectual, and that the two successions shall fall to the heirs intestate.

§ 26.

That such a substitution may have its effect, it is requisite, 1.) That it be made by fathers and mothers, &c. in a valid will; and our will is, that it shall not have its effect, if it be made in a codicil, or in any other way: 2.) That fathers and mothers appoint in their will, or disinherit expressly, or by name, the child incapable of making a will: 3.) That they appoint or disinherit likewise those whom the child must necessarily have appointed his heirs, or disinherited, if he had the capacity requisite: 4.) When there are none of those necessary heirs, fathers and mothers may substitute to the child who cannot make any will, any other person capable of receiving by will; wherefore also his mother may substitute to him even the child's stepfather.

§ 27.

There are then none but fathers and mothers, and the ascendants both on the father's and mother's side, who can make a supposed pupillary substitution; that is to say, name an heir to succeed to the effects of the child incapable of making a will.

It thence follows, that a mother and a grandmother (but not the father nor the grandfather)

can substitute by a supposed pupillary substitution to their illegitimate children.

A stranger has not a right to substitute to the child of a third person, by a supposed pupillary substitution, except for the share of effects which he has left him as his own heir.

When a father and a mother substitute to children, who are incapable of making a will, different persons, and when, for example, the father substitutes to them Caius, and the mother Seius, when the succession opens, Caius shall succeed to the paternal fortune, and Seius to the maternal. But, as to the child's fortune, the two substitutes shall succeed to it by equal portions.

§ 28.

The condition of the supposed pupillary substitution exists, when the children happen to die during their incapacity.

§ 29.

Moreover, there is likewise, in this case, but one single settlement, *and one single will*, though there be really two successions; see above, § 18.; and the substitute, when the condition exists, succeeds to the two successions; see § 21. and excludes all the other relations, excepting those to whom he would have been obliged to leave a legitim, if he had been capable of making a will. See § 26. n. 3.

§ 30.

The supposed pupillary substitution ceases to have any effect in the same cases as the pupillary substitution, excepting in the two first cases. On the other side, neither has the supposed pupillary substitution any effect in the following cases; namely, 1.) When the incapacity of making a will ceases, and the heir appointed preserves the capacity of making a will to the end.

If

If the heir appointed had profited of an interval, in which he had the entire free use of his reason, to make a will himself, neither would the substitution have any effect, even though he should afterward again lose his understanding.

2.) This substitution has likewise no effect after a certain number of years, when the testator has settled a certain time, during which only it ought to take place; for example, if he said, *I substitute Caius to my son who has lost his judgment, in case the latter die in that condition, within the space of ten years.*

A R T. IV.

*Of the military substitution.**(De substitutione militari.)*

§ 31.

ONE of the chief privileges, with respect to the making of a will annexed to the military state, and established both in favour of officers, non-commissioned officers, and soldiers, is, that they may make a pupillary or supposed pupillary substitution to their children, even though they may have made no will, or may have omitted them in their will, or may have extended the substitution beyond the age of puberty, or may have substituted to a child already arrived at that age.

§ 32.

When they appoint strangers for their heirs, they have also a right to substitute to them an heir by a pupillary or supposed pupillary substitution.

§ 33.

Under the military substitution are tacitly included
all

all the other substitutions: thus when a soldier appoints an heir, and substitutes to him another heir, under any form or condition whatever, the substitute succeeds, a) When the heir appointed renounces his succession, and will not, nor cannot be heir; b) When being in pupillarity, he dies before the age of puberty; or, c) When being incapable of making a will himself, he happens to die during his incapacity.

T I T L E VIII.

Of successions in trust.

(De fideicommissis.)

§ 1.

AFTER having treated in the preceding title of direct substitutions, (*de substitutione heredis directa*), it is proper to explain the subject of feoffments in trust, or of succession in trust, (*de substitutione fideicommissaria.*)

§ 2.

We have already shown in the preceding title wherein consists the difference between those two kinds of substitutions, namely, that the first kind of substitution was called direct, because the substitute gets immediately and directly the testator's succession, when the heir appointed will not or cannot be heir; whereas in the substitution in trust, the substitute receives the succession only from the heir appointed, to whom the testator has intrusted it. This is also the reason that this last kind of substitution is called *fideicommissary*, or in trust; that is to say, a succession *intrusted to the fidelity* of some person. The heir appointed has been called *fiduciarius*, a trustee or feoffee in trust, because the testator confides in him with respect to the restitution

tution of the succession; and the substitute has been called fideicommissary, (*heres fideicommissarius*), because he gets the succession only from the person in whose honesty and fidelity the testator confided with respect to the restitution of the succession.

§ 3.

A succession in trust supposes that the heir is obliged to restore to the substitute the succession, (*omne jus defuncti*), or only a part of the succession.

§ 4.

A settlement by which the testator begs the heir whom he appoints to restore to a third party all the fortune (*omnia bona*) which he leaves, is not then an universal feoffment in trust, but only a particular trust or feoffment in trust, (*fideicommissum particulare*), or a legacy of all his effects, (*legatum omnium bonorum*).

§ 5.

A man may also make a trust-deed, or feoffment in trust, by a deed among the living, (*per pactum inter vivos*), by a contract of marriage, by an agreement, and by simple promise; and in whatever other way the trust be made, one may apply to it, as to its object, and the effect that it is to have, (*quoad pactum, objectum, et effectum*), all that shall be prescribed in this title concerning testamentary trusts, or feoffments in trust.

§ 6.

Particular trusts (*fideicommissa singularia*) may likewise be made, restrained to certain effects belonging to the subject of legacies, which we shall treat of in the following book.

§ 7.

1.) That the universal trust, or feoffment in trust, made in a testamentary disposition, may be valid, it is requisite that the testator be in a capacity to make a will, (*ut habeat testamenti factionem*); 2.) That he declare

clare distinctly his will and intention to make a trust-deed, or feoffment in trust; 3.) That the heir appointed, called *fiduciarius*, feoffee in trust, or trustee, accept the inheritance, and take possession of it; and, 4.) That the person to whom the succession is to be restored, accept it also, and be in a capacity to accept it.

§ 8.

I.) For the validity of an universal trust-deed, or feoffment in trust, it is then requisite, in the first place, that the person who wants to make such a trust, or feoffment in trust, in a testamentary settlement, do it in a judicial will, and consequently be capable of making a will; a subject which has been treated of above, in book VII. title II.

So, for the future, no trust or feoffment in trust can be made in a codicil, or in letters, nor can the heirs intestate be burdened with it.

§ 9.

II.) It is requisite, in the second place, that the testator explain and declare very distinctly his will and intention to make a trust, or feoffment in trust; wherefore a person who makes a will by word of mouth, cannot make known his will by signals and motions of the head, but he ought to raise his voice, and make known his intentions by words distinct and well articulated.

N. 1. An intention to make a trust-deed, or feoffment in trust, may, nevertheless, be declared indirectly; for example, when a testator prohibits the heir appointed to alienate the succession in whole or in part, and the heir appointed has children, or when there is a substitution: for in this case it is supposed that the prohibition was made for the good of the children or substitutes.

Except in these two cases a prohibition to alienate shall

shall be ineffectual, and an heir may, notwithstanding of such prohibition, dispose at his pleasure of the succession or legacy.

N. 2. Though the testator have made but one kind of prohibition to alienate, the other kinds of alienation are nevertheless included in it; for example, if he have forbid to sell an estate, it cannot be alienated by a legacy, by a donation, &c.; one has not even a right to mortgage it.

N. 3. The prohibition may be either personal or real. By the personal prohibition is understood that which is directed only to the heir, and restrained to his person; for example, when a testator interdicts the heir simply from the alienation of a subject, or of an estate. But a real prohibition takes place, when the prohibition to alienate is annexed to the subject or estate itself; for example, when a testator declares that the succession, &c. is not to be alienated. In the first case, the trust, or feoffment in trust, is extinguished by the death of the heir appointed, called *fiduciarius*, and his heirs have a right to alienate the trust, or feoffment in trust; in the second case, the trust subsists still with respect to the fideicommissary heirs, when there are children or an heir substituted. See n. 1.

N. 4. The testator has also a right to interdict his heirs from alienating either in perpetuity, (*in perpetuum*), *when the testator leaves in legacy a trust to a family, or to relations*: it is also indifferent whether he expresses himself thus, *I will that the estate remain in the family*, or if he say, *I will not have the estate alienated out of the family*. The prohibition for a certain time is made, when, for example, the feoffment in trust is limited to the second, third, &c. generation, or when the heir is prohibited to alienate any thing of the succession for thirty years.

N. 5. Nevertheless the prohibition to alienate ceases

to have any effect, when all the relations consent to the alienation, and consequently to the extinction of the feoffment in trust; the reason of which is, that the feoffment in trust was made in their favour.

Neither can the heirs of such as have given their consent claim the estate, because they are answerable for the deed of their parents, (*factum parentum præstant*); which shall take place, even though they should renounce the other effects of the succession of their fathers and mothers.

§ 10.

The testator may likewise impose on the fideicommissary heirs all the conditions which he has a right to impose on direct heirs, and which shall be treated of below, in title XIII.

§ 11.

There is often a tacit condition included in the trust, or feoffment in trust, namely, when the testator requires the heir appointed, called *fiduciarius*, to restore the succession to his own proper son; for this settlement cannot be understood but of the case in which the heir's son shall cease to be under his paternal power; the reason of which is, that a father has the usufruct of his son's adventitious pecul ar.

It is also a tacit condition, when a man appoints for his heirs his own children, his father and mother, and his brothers, requiring them to restore, after their death, the succession to a third party; for that settlement includes always the condition, namely, *if they leave neither children nor grandchildren*. This condition shall likewise be understood, even though the restitution to the succession was to be made for pious uses.

§ 12.

A trust, or feoffment in trust, may be made either,
a) In favour of certain persons; or, b) In favour of a
relation;

relation; or, c) In favour of a family; or, d) In favour of a body or community.

N. 1. When the feoffment in trust is confined to certain persons, if they renounce it, all the succession remains to the heir called *fiduciarius*.

N. 2. When the succession is in general to be restored to relations, they come all in competition together, whether they be males or females; but when the feoffment in trust is left in legacy to agnats, none but the males succeed.

When a testator leaves a feoffment in trust to his nearest relation, thereby must be understood not the persons who were his nearest relations when he made his will, but the nearest relations he leaves at his death.

N. 3. When a testator leaves a trust, or feoffment in trust, to his family, the males alone are called to the succession, unless the testator expressly calls the females.

In the family are included not only the descendants, but also collaterals.

N. 4. When the testator leaves in general terms a feoffment in trust to his relations, or to his family, and, at the same time, specially names any one of the members of the family, the latter shall be preferred, even to such as are nearer than he.

N. 5. When the heir intrusted with a feoffment in trust (*fiduciarius*) happens to die, and leaving near relations, there are likewise near relations of the testator, it has been made a question, which of the fideicommissary heirs ought to be reckoned the nearest heir, the nearest relation of the testator, or the nearest relation of the last possessor? We enact and ordain, that the nearest relation of the testator shall succeed, because all the fideicommissary heirs hold their right by the testator's settlement: whence it follows, that the testator's nearest relations have an older right, and

consequently they ought to be preferred to the nearest relations of the last deceased.

N. 6. The right of representation likewise takes place with respect to feoffments in trust left to relations, or to the family, in the same way as that right is regulated by successions intestate; wherefore half-brothers and their children do not come in competition with brothers-german and their children.

N. 7. Feoffments in trust made in favour of relations, or of a family, have their effect while there are relations, or any person of the family, which is extended till the tenth degree of proximity, and not further; if the testator have fixed a certain degree at which the feoffment in trust shall come to an end, it shall cease to take place as soon as the case shall happen.

N. 8. A feoffment in trust may be made in favour of a body, or in favour of a community, of a city, of a church, of a chapter, of a convent, &c. provided it be not an immoveable subject, or a sum above five hundred rix-dollars; the reason of which is, that immoveable subjects cannot be given in mortmain (*ad manus mortuas*) without special consent, and that a legacy cannot be made to an ecclesiastic community above five hundred rix-dollars.

§ 13.

III.) It is requisite, in the third place, that the heir intrusted with a feoffment in trust (*fiduciarius*) take the title of heir, and afterwards restore the succession to the fideicommissary heirs.

N. 1. When the heir intrusted to restore is either a pupil or under age, neither of the two can accept the succession, unless in the first case the guardian interpose his authority, and in the second the curator give his consent.

N. 2. When the heir intrusted to restore will not accept the succession, it shall not be necessary to get him

him constrained to do so by the authority of the judge; but our will is, that, in this case, he be reckoned in law to have taken the quality of heir, and that the fideicommissary heir, coming in his place, may accept the inheritance. See § 22.

N. 3. Neither can the heir charged to restore renounce the succession, when he has already reaped any advantage from it, or when the renunciation is made to defraud creditors, or to the prejudice of the public. See the following section, n. 2.

§ 14.

IV.) In fine, it is requisite that the person to whom the fideicommissary succession is to be restored, shall accept of it.

N. 1. When he does not accept it, and the feoffment in trust is limited to his person, the heir called *fiduciarius*, keeps the whole succession: the trust-deed subsists however as to legacies, when the fideicommissary heir has been burdened to pay any.

But if the feoffment in trust were made to several persons, as happens when it is left to a family, in this case all those who compose the family must be informed of the renunciation of the nearest fideicommissary heir, and the heir charged to restore (*fiduciarius*) cannot assume the succession till they have all given their declaration, whether they will accept the feoffment in trust.

N. 2. The fideicommissary heir is obliged to accept the feoffment in trust, when he is debtor to the exchequer, or when there are other debts that he is not in a condition to pay. See § 13. n. 3. The exchequer and the creditors have even a right to claim the succession from any possessor, by a Paulian action, (*actione Pauliana*.)

N. 3. When one of the fideicommissary heirs shall once renounce the feoffment in trust, and will not accept

cept the succession, he shall not afterward be allowed to demand it.

But if, within the time prescribed, he allege good reasons to be restored against his renunciation, they shall be received and examined; and if, after the demand for restitution, he happen to die, his heirs shall be allowed to prosecute the cause; but they would not be heard if the suit were only to be begun.

§ 15.

The object of an universal feoffment in trust is the whole succession, or a part of the succession; in one word, all that the heir-trustee (*fiduciarius*) has received as heir; whence it results that the testator cannot, in any way, oblige him to restore more than the amount of the inheritance.

N. 1. Under the restitution that the heir intrusted with the feoffment ought to make, are included the accessions and fruits which have augmented the succession, before his entrance on the inheritance.

N. 2. When the heir intrusted with the feoffment shall enjoy any fruits of the succession after it is opened, he shall also be obliged to restore them, if he have been backward in making restitution of the trust. But,

N. 3. When the heir intrusted with the feoffment is to restore only after his death, he shall appropriate to himself all the fruits which he shall receive, even though they were not consumed at the time of his decease, and were still existent; which shall also take place, even though the testator had ordained him to restore to the fideicommissary heirs all that he should acquire, or all that should remain to him of his fortune.

N. 4. The obligation to restore an universal trust or feoffment in trust, is not extended, 1.) To fiefs which, by the agreements and foresight (*ex pacto et providentia*)

providentia) of ancestors, return to the heir called *fiduciarius*; it is otherwise of fiefs which are simply hereditary.

Neither can the obligation be extended, 2.) To what the testator owed to the heir intrusted with the feoffment, and which consequently he may deduct from it.

3.) To what that heir has expended for the preservation and melioration of the succession.

4.) To a family-tomb, which remains with the family.

N. 5. When the testator has settled a portion in favour of the daughter of the heir intrusted with the feoffment, or a donation in prospect of marriage in favour of his son, the fideicommissary heir cannot oblige them to restore those advantages which the testator has given them.

N. 6. The heir intrusted with the feoffment shall not be obliged to restore the legacies left him by the testator, though this last had ordered that the heir shall restore all that he has received of his effects.

§ 16.

From what is said, it evidently follows that the heir intrusted with a feoffment has not a right to alienate any thing whatever of the succession, which he is obliged to restore; neither has he a right to oblige any of the fideicommissary heirs either to consent to the alienation, or to buy themselves what belongs to the heritage.

When the heir intrusted with the feoffment shall alienate a thing or subject belonging to the succession, he shall forfeit all the succession, which shall be taken from him without form of law, in order to put the nearest fideicommissary heir in possession of it.

N. 1. Neither can an heir intrusted with restoring the succession transact concerning it, or concerning any

any one of the things which make a part of it, nor pawn nor mortgage them : but he may establish on those subjects a right of servitude or of surface, or set them to a tenant for several years ; provided always that the right which he grants shall cease when his own right shall be extinguished.

N. 2. The rule which would have the heir intrusted to restore not to have power to alienate the succession admits an exception when the alienation is necessary ; namely, 1.) When the testator having left debts, he is obliged, for payment of them, to sell a part of the effects of the succession.

2.) When there are subjects of the succession which cannot be preserved, and which would perish in time ; but, in this case, the heir charged to restore, is obliged to restore their value, and, if he buy like things, and of the same value, they shall be included in the trust, in place of those which he may be obliged to alienate.

3.) When the heir intrusted to restore shall himself have debts, there may be occasion for a real seisure of the incomes of the feoffment in trust, as long as he is to enjoy it ; but, when the time of restoring the feoffment is come, the real seisure shall no longer have any effect with respect to those incomes.

An alienation may likewise be made,

4.) When all concerned in the trust-right or feoffment in trust, that is to say, all those to whom it is to be restored afterward, shall consent to the alienation.

5.) When the person who alienates is the last of the family, even though he should leave children ; the reason of which is, that they are answerable for their father's deeds.

6.) But the heirs of the person who is charged to restore the trust-right, or feoffment in trust, have no right to take out of it a portion or a donation, in prospect

prospect of marriage, far less are they entitled to claim aliments, or the expenses of education.

§ 17.

When the testator has not ordered the heir whom he appoints, to restore all his succession, or a certain share of it, but has simply ordered him to restore what shall be remaining of the succession, when he himself shall happen to die; in this case the heir has a right to alienate three fourths of it, and to leave only the fourth to the fideicommissary heirs.

§ 18.

To prevent law-suits afterward on account of the succession, and of what belongs to it, every fideicommissary heir has a right to demand that the heir intrusted with a feoffment should make, in his presence, before entering on the inheritance, a formal inventory.

When none of the fideicommissary heirs shall demand an inventory to be made, the heir intrusted to restore shall make it judicially, without being required to do so within the space of three months at most; failing which he is to expect that the fideicommissary heirs will be allowed their oath *ad litem*; for we will not allow that, in this case, the heir intrusted with the feoffment be permitted to give in a particular account, though he offer to do so upon oath.

§ 19.

The fideicommissary heirs may likewise implore the assistance of the judge, to oblige the heir intrusted with the feoffment to give security that he will restore faithfully the whole in due time; it would be otherwise if the testator had remitted his security; in both cases the fideicommissary heirs have a tacit mortgage on the other effects of the heir charged with the trust-right, or feoffment in trust.

N. 1. When the fideicommissary heirs are called successively to the trust-right, and it has been restored to the nearest, the rest have a right to require him to give security.

N. 2. When the heir who is to give security cannot give it by pledges or bondsmen, he shall not be allowed to give his oath in security, but the succession shall be sequestered, and the immoveable subject set to tenants.

§ 20.

That the heir charged to restore may have time to be informed of the state of the succession, and that he may make no rash step, we allow him a time to deliberate, (*tempus deliberandi.*)

§ 21.

Moreover, the heir intrusted with a feoffment or trust-right is answerable for the fraud and great faults (*dolum et latam culpam præstat*) which he may have committed; but he is not obliged to be answerable for the things which are lost by his fault, when it is a slight fault, (*non ex culpa levi tenetur*), unless he have been dilatory in restoring the trust right or estate.

§ 22.

The Roman laws reckoned it an essential condition of a trust-right, or feoffment in trust, that the heir appointed and required to restore the succession, should accept it, and take the quality and title of heir; the reason of which was, that the whole trust-right or feoffment in trust was ineffectual, when the heir would not accept the succession.

That the will, then, and fideicommissary succession might be supported by entering upon the inheritance, they allowed the heir intrusted with a feoffment in trust, or trust-estate, to retain a fourth of it, after deduction of the debts, (*cum onere et commodo*), which
fourth

fourth was called the Trebellianic fourth, (*quarta Trebellianica*.)

But, as the settlement of this fourth occasioned almost insurmountable difficulties, both with respect to its difference from the Falcidian, and with respect to the way of reckoning, and the cases in which it did not take place, (*ratione exclusionis quartæ*); we enact and ordain by these presents, and lay it down as a general rule, that, for the future, no heir can retain the Trebellianic fourth, and that the heir intrusted with the feoffment or trust-estate, shall be obliged to restore it to the fideicommissary heir, without deducting the fourth from it.

If he will not accept the succession, it shall not be necessary to constrain him to do so, but the fideicommissary heir shall have a right immediately to appropriate to himself the succession, without waiting till it be restored to him; at any rate he shall be put in possession of it by authority of the judge; see above, § 13. which shall likewise be observed with regard to the other fideicommissary heirs intrusted with restoring the succession to those who follow them.

§ 23.

The effect of an universal trust-right, or feoffment in trust, consists, 1.) In this, that the heir intrusted with a feoffment, or trust-estate, is obliged to restore to the fideicommissary heirs all that he has received in quality of heir, and according to the inventory made of the succession. See above, § 15.

When the heir intrusted to restore dies before the testator, the feoffment or trust-right nevertheless continues to have its effect, and the fideicommissary heir may take the title and quality of heir, and accept the succession, without waiting till it be restored to him.

§ 24.

When the heir intrusted with the feoffment or trust-

P p 2

estate,

estate, or his heir, reaps any advantage from the succession; for example, when the testator allows him to retain a thing or subject belonging to the succession, or to deduct from it a certain sum, he is obliged to pay the burdens of the succession in proportion to what he gets.

But if he reap no advantage from it, and be obliged immediately to restore the succession, all the debts due to or by it are transferred to the fideicommissary heir, the heir intrusted with the feoffment or trust-estate not being to bear any burden of a succession from which he reaps no profit; but he shall not have a right to deduct from it the Trebellianic fourth, since we have entirely abolished it, on account of the innumerable subtilties which it occasioned.

§ 25.

A trust-right or feoffment in trust, and the action arising from it, are prescribed in thirty years; but the prescription does not begin to run till the time that the trust right and estate fall to the fideicommissary heir.

§ 26.

The restitution is made in two ways, either verbally, (*verbis*), or really, (*re*): it takes place verbally, (*verbis*), when the heir intrusted with the feoffment or trust-estate declares, by words or in writing, that he wants to restore the succession to the fideicommissary heirs: it takes place really, (*re*), when the heir intrusted with the feoffment or trust-estate delivers it effectually and really to the fideicommissary heir, or to his commissioner or attorney, or even to a third party, whose acceptance the fideicommissary heir afterward ratifies.

In the first case, the fideicommissary heir acquires only the right of succeeding, and consequently he has the action called *petitio hereditatis fideicommissaria*. Observe,

serve, that, to this action may be applied all that was prescribed concerning the action called *petitio hereditatis*.

In the second case, when the succession is restored in fact or really, (*re*), the fideicommissary heir acquires the possession, and, by that means, all the interdicts allowed to the possessor.

He may also, in quality of proprietor, claim the things belonging to the succession from all such as possess them.

T I T L E IX.

Of mutual wills between husband and wife.

§ 1.

IT pretty frequently happens that a husband and his wife make a mutual will, which hitherto has occasioned frequent law-suits.

§ 2.

Such a will may be made either by words or in writing.

§ 3.

The laws require for a mutual will made by writing,

1.) That the husband and wife include it in one and the same deed; either by executing their last will jointly, for example, by expressing themselves in this manner, *We subscribers, husband and wife, &c.*; or by making their will the one after the other. 2.) That they present this deed in court, which shall be equally valid, whether each party have signed their own settlement in particular, or if both have signed the whole will.

§ 4.

§ 4.

When they want both to make their will verbally, for such a mutual will the one must declare after the other, but immediately following, of which a record shall be kept; as to the wife's declaration, it is requisite that she make it herself, and not by the mouth of her husband.

§ 5.

Such a mutual will, whether made by writing or in words, is but one single and the same will, which consequently does not require double solemnities: it is sufficient likewise that one of the spouses have caused the judge to be called, and that the same judge receive the settlements of both, provided it be done altogether, (*uno contextu.*)

Moreover, the judges shall observe, on this occasion, the precautions prescribed above, in title III. § 3.; and the wife shall be heard separately on the articles mentioned.

§ 6.

Besides, it is indubitable, that in this will are also to be observed the solemnities which are called interior or intrinsic, (*solemnitates intrinsecæ.*)

§ 7.

Lawyers have disputed, whether one of the spouses may make any alteration in their testamentary settlement in their lifetime, or to take place after their death. Some have denied, and some affirmed, that they might. Others, in fine, have said, that a distinction must be made in a will, whether it were what is called *correspondivum* or not; that is to say, whether the husband, for example, had appointed his wife his heir, or left any thing in legacy to his wife's relations, or disposed in favour of his wife and her relations, only because his wife had mutually provided for him
the

the same advantages ; or, if the testamentary and mutual settlement bore no such thing.

We entirely abolish, by these presents, that distinction which is altogether destitute of foundation, and we establish it as a certain rule, that all mutual wills, which a husband and a wife shall offer in court in the manner prescribed, whether by word or in writing, be reckoned wills of the first kind, (*correspondiva*), that is to say, they shall be reckoned to have been made with a view to a return.

For it is natural and rational to presume, that a wife, for example, provides advantages to her husband and his relations, because her husband also remembered her and her relations in his will, and that she would not have provided those advantages if her husband had not thought of her and her relations.

We enact and ordain, in consequence of this principle, that when one of the spouses shall revoke their testamentary settlement in their lifetime, or it shall otherwise be annulled, the settlement of the other shall likewise be annulled.

But when one of the spouses happens to die, if the other spouse accept the succession, the mutual will cannot be altered.

Consequently those who shall have any advantages to expect, by virtue of that will, shall acquire a right of which the survivor cannot deprive them by any alterations which he may make in it.

The survivor would also act unfairly, if, after accepting the succession of the defunct spouse, and profiting of the settlements made by the deceased in favour of the survivor and his relations, he wanted to revoke the settlement with respect to the advantages provided by himself to the deceased spouse and relations.

§ 8.

This rule admits an exception, when the spouses have

have reserved to the survivor a liberty to make alterations in the will. For, in this case, the survivor shall profit of the advantages acquired to him by the defunct's settlement, even though he should happen to revoke his own settlement.

T I T L E X.

Of stipulated succession.

(De successione conventionali.)

§ 1.

BY the Roman laws, every covenant or agreement concerning the succession of a living person, was, in general, unlawful: the foundation of this decision was the groundless presumption, that such an agreement would naturally induce the heir to wish for the testator's death, which they called *votum captanda mortis*.

§ 2.

We, on the contrary, think it just, that every one have a right to contract in his lifetime with another concerning his future succession: and as such agreements have been allowed between husband and wife, in covenants of fraternity, and to soldiers, we do not see any reason hindering us from making it a general rule.

§ 3.

Wherefore we will and ordain, that agreements which shall be made concerning the succession of a person in entire health, (*de hereditate viventis*), and where the consent of both parties shall be adhibited, be valid.

§ 4.

§ 4.

That kind of agreement shall be valid; first, when the question is to preserve a succession, (*de conservanda hereditate*), for example, when a relation; whether an agnat or a cognat, who has a right to succeed intestate, shall contract with the testator, that he may appoint no other heir, and leave him the succession intestate.

This kind of agreements shall likewise be valid; when the succession of a stranger is to be acquired, (*de acquirenda hereditate*); for example, when Caius entering into an agreement concerning his succession with Seius, shall promise him not to make a will, and shall declare, at the same time, that Seius is to have his succession; this settlement shall have the force of a covenant, (*vim pacti*), and it shall not be necessary to confirm it by oath.

§ 5.

To decide the case about an agreement with respect to the succession of a third party, in which the contracting parties have settled the manner of disposing of his effects after his death; lawyers have said, that a distinction was to be made whether this third person be named and known, or whether the contracting parties, having no particular person in view, have agreed in general concerning the successions which may fall to either; and they have decided, that the covenant would be null in the first case, *propter votum captandæ mortis*; but that it would be valid in the second case, where it is not to be dreaded that any one's death should be desired as it is a third party unknown.

As to us, we will and ordain, that in both cases the agreement be valid.

The reason of which is, that such an agreement always includes this tacit condition, *when the succession shall fall at any time to the party contracting*; besides, no prejudice is occasioned to the third party, whom the

agreement does not occasion to die either sooner or later.

§ 6.

There is still less doubt of the validity of those agreements, when the contracting parties mutually dispose of their estates in favour of the survivor.

But to prevent any difference on that head, our will is, that a settlement concerning the succession of a living person (*de hereditate viventis*) be taken down in writing, and signed by both parties in presence of two witnesses.

§ 7.

Moreover, every one shall likewise have a liberty to renounce a succession which he may expect, either from the contracting party, or from a third person, and to agree on it in presence of two witnesses by a written contract; neither shall it be necessary that the renunciation be made upon oath, and it shall be sufficient if it be not made to defraud creditors and the exchequer, nor to the prejudice of the statutory portion.

§ 8.

By virtue of such an agreement a man shall have a personal action according to the nature of the agreement, namely, the action either *ex empto*, or *ex transacto*, or *ex pacto*, &c. by which the demandant shall sue the defendant for performance of his promise; he may likewise raise against any possessor the action called *utilem possessionem hereditatis*.

§ 9.

The contracting parties have not a right to derogate from such an agreement without the consent of each other, which, however, shall not hinder each from disposing of his fortune by deeds among the living; for by succession is meant only the effects which shall exist at the time of one's decease.

§ 10.

§ 10.

An agreement concerning succession (*successio conventionalis*) is dissolved, 1.) When the two contracting parties renounce the contract by writing, and in presence of two witnesses by a new agreement.

2.) When the contracting party, who by an agreement has granted his share to another, or even has renounced the succession which he had to expect from a third party, had no children at the time he contracted, and has some born afterward.

3.) When a person to whom a succession had been granted by an agreement allows thirty years to elapse, reckoning from the day it fell to him without demanding it.

T I T L E XI.

Of privileged wills.

§ 1.

THE laws have excepted certain cases, in which it is not necessary to observe the forms prescribed for solemn wills.

Such are privileged wills, among which are reckoned, 1.) The military will; see art. I.; 2.) The will of a father or mother among their children; see art. II.; 3.) The will made in time of pestilence; see art. III.

A R T. I.

Of military wills.

§ 2.

AN officer, a non-commissioned officer, and a soldier, when they are in garrison, are obliged to make their will according to the common law; that is to say, to make their will judicially, and in that case they have no more privileges than other members of society: but when they shall be really in the field, they may make their wills according to what is prescribed by the ordinance of the 18th of May 1747, which regulates what is to take place with respect to wills made in the field.

§ 3.

We will then and ordain, that it be received as a law and constant rule, that all wills, and all testamentary settlements, which may be made in the field by officers, non-commissioned officers, and soldiers, and all such as belong to the army, without observing the formalities prescribed for solemn wills, be as valid as if they had been made in a garrison, or in a town, where there is nothing to be feared from the enemy, and observing all those solemnities; it is however necessary that there be some certainty of the defunct's last will, and that it be evident that he has disposed of his effects in case of death, in such and such a manner, and that there be no proof nor suspicion founded on fraud to the contrary. We enact and ordain likewise, that this law shall serve for a rule, not only for future cases, but also for the cases which have happened lately, as we have ordained by our act of council, which we have directed to our auditor-general the 11th of May 1751.

§ 4.

§ 4.

So every military will, codicil, donation, and other settlement in prospect of death, whatever name is given it, shall be valid and privileged, not only when an officer or a soldier shall dispose of his effects in the face of the enemy, or in warlike expeditions, but also when he shall make his will one or two days before marching out of quarters on an unforeseen order, which may be given to the troops to march immediately, or when the will may be made on the march itself; and our will is, that no regard be paid to the remoteness or nearness of the enemy, nor any distinction made whether the will were made in the camp, or in the open field, before a town which they are besieging, or in one where they are besieged or blockaded.

§ 5.

A military will shall likewise be privileged, when it is made at a time when the troops are cantoned, or even when during the campaign they shall be in a garrison where an attack is to be expected from the enemy; likewise, when a soldier is commanded on an escort to reconnoitre, or to act in any other military expedition; likewise, when he has obtained permission to leave the camp and go elsewhere, whether on account of sickness, of a wound, or of other indispensable occupation; likewise, when the will shall be made in returning from the campaign on the march going to winter-quarters, or in the places of their cantonment, and even when the officer or soldier makes his will in winter-quarters, if the troops be quartered in an enemy's country, or on the frontiers, to cover our dominions from the incursions of the enemies: in all those, and other like cases, in which an officer or soldier shall precipitately dispose of his effects, on account of the dangers to which he is exposed in time of war, military settlements or wills shall be valid, though

though the forms prescribed by the laws for solemn wills be not observed.

§ 6.

“ Officers, non-commissioned officers, and soldiers,
 “ have a right, in the cases mentioned, to pass over
 “ their children in silence, to disinherit them without
 “ alleging a cause, and appoint them heirs under a
 “ casual and mixed condition, (*sub conditione casuali et*
 “ *mixta*). They are also intitled to appoint for their
 “ heirs persons who, according to the laws, would be
 “ incapable of inheriting in any other case.

“ N. 1. They have likewise a right to substitute to
 “ their children, without having appointed them heirs,
 “ and without having made a will,

“ N. 2. When a posthumous child is born after
 “ their death, it does not annul their will, unless the
 “ testator knew of his wife's pregnancy.

“ N. 3. It is sufficient also if they be capable of
 “ making a will at the time of their decease; and the
 “ will would be valid, even though the testator had
 “ been incapable at the time of making it,

§ 7.

“ Among the persons who have a right to make
 “ such a military and privileged will, are reckoned
 “ auditors and quartermasters of regiments, all such
 “ as are employed in furnishing provisions, commis-
 “ saries of provisions and their assistants, officers ser-
 “ vants, chaplains of regiments, sutlers, musterma-
 “ sters, soldiers wives who remain in the camp; but
 “ not Jews, debauched women, nor the executioner
 “ nor his men, &c.

§ 8.

“ When a soldier shall be condemned to death for
 “ a crime, if it be not for that of desertion, he shall
 “ have a right to make such a military will.”

§ 9.

§ 9.

But that no vain doubts may be raised concerning the certainty and truth of the settlement, and that all fraud and law-suits may as much as possible be prevented, we enact and ordain, that when an officer, or any other person belonging to the army, shall have declared his last intention in writing, whether in form of a will, of a codicil, of a donation, or by an ordinary letter, or only by a note, and when the settlement written entirely by the testator's own hand shall be such as plainly expresses his meaning and intention, such a settlement shall be valid and above any objection: in case the settlement were not written by the testator, it shall be sufficient that, being signed by him, it be written by a creditable person; but if the hand were unknown, the disposition or settlement must be signed, not only by the testator, but also by an unexceptionable witness.

§ 10.

As to testamentary settlements made in words, our will is, that when they shall be made by a non-commissioned officer, or by a common soldier, to an officer who has no concern in it, or by an officer to another officer who has no interest in it, that they be valid, if the testator have made his will on a day of battle, or in other actions and rencounters with the enemy, as also in a siege: Except in the cases mentioned, a settlement made in words must be proved by two creditable witnesses; and it shall not be sufficient that an officer or a soldier have mentioned his will in conversation, or in joke; but it is requisite that he have had a serious design to make his will, which, in a dubious case, however, shall be presumed when he shall have made a testamentary settlement.

§ 11.

Moreover, the expressions or arrangement of a soldier's

dier's testamentary settlement shall not be minded, provided his meaning and intention can be understood.

§ 12.

This military will occasioned and made in sight of the danger to which persons in the army are continually exposed, or in expectation of an action, shall still subsist after the danger or the action, though the testator have not lost his life in it, provided he have not revoked his testamentary settlement, or made any alteration in it.

§ 13.

Nevertheless there are cases in which such military and privileged wills shall be ineffectual, namely,

1.) When they shall be made by officers, non-commissioned officers, and common soldiers, who shall have deserted their colours.

2.) When the officers or soldiers who have made such a will, shall be discharged for disgraceful and infamous causes.

3.) When they shall revoke their last will in the same manner that they declared it; or,

4.) When they shall tear, cancel, or deface it in a sober mood.

5.) In case a military man have made two military wills, they shall both be valid, if they be not contradictory; but in case of contradiction, the last shall be preferred to the first. In fine,

6.) A military will shall not be annulled when the testator after the war or campaign shall continue in any garrison, or shall obtain his discharge for an honest and lawful reason. See the preceding section.

§ 14.

The custom concerning receiving judicial wills in regiments being hitherto various, we declare by these presents, that in the cases above mentioned, in which
wills

wills and other testamentary settlements are privileged, it shall nowise be necessary to make them judicially: nevertheless, when any one, without being obliged to it, inclines to give his will in writing, or to declare it by words to the colonel or commandant of the regiment, or even to an auditor who is sworn, that shall be sufficient to make it valid as a judicial will.

§ 15.

But in any other case, when in time of peace the troops shall be in their quarters or garrison, and any one wants judicially to remit his will to a regiment, our will is, that if he be not afraid of a sudden death, an officer be commanded jointly with the auditor to receive his testament, or declaration of his last will.

§ 16.

Nevertheless when a will, a codicil, or a donation, in prospect of death, is to be presented, or a testamentary settlement to be declared by words before the tribunal established for military persons, called the *general audience*, it shall be sufficient, according to what has hitherto been practised, that the declaration be made before the auditor-general, or, in his absence, before his substitute, or other superior auditor whom he may also depute for that purpose; another superior or ordinary auditor may likewise be called, or the secretary; for circumstances do not always allow to call them to it.

A R T. II.

Of a parent's will among his children.

(De testamento parentum inter liberos.)

§ 17.

AMong privileged wills are reckoned the will which a father makes among his children, without observing any of the exterior solemnities.

These privileges belong only to ascendants; wherefore also children cannot make such a settlement among their ascendants.

§ 18.

That the will of a parent among his children may subsist, it is requisite,

I.) That it be made by an ascendant; that is to say, by the father or mother, or by the grandfather or grandmother; it shall even be valid, though the father or mother have married a second time, provided however that they are to be liable in the penalties ordained against such as enter into a second marriage.

II.) That the settlement concern only the children, and that there be no legacies in it for strangers. See § 20.

III.) That the settlement likewise concern only the children, who are necessarily to be appointed heirs, or disinherited, of whom we have treated above.

IV.) That the will be thoroughly finished, as is proper, that the day and the year be marked in it, and that it be written and signed by the testator's own hand; so a simple signature will not be sufficient, even though it were accompanied with the subscription of some witnesses: likewise, any declaration made in words,

words, even though it were made in presence of witnesses, nor a codicil, nor any other act can be valid, on the footing of a will of a father among his children.

V.) That the father and mother appoint expressly by name their children for their heirs, and leave them at least the legitim under that title, or that they disinherit them; whence it follows, that, if the children be omitted, the whole will is null: if they be disinherited without a cause, they may get the will annulled on a complaint or objection of undutifulness, (*per querelam inofficiosi.*)

§ 19.

Moreover, the laws require no solemnity for the validity of this will; neither is it necessary to present it in court.

§ 20.

This will is only valid with respect to children. See § 18.

Wherefore strangers can receive nothing in virtue of such a will; and, among strangers, are reckoned the wife, the brothers and sisters of fathers and mothers, fathers-in-law and mothers-in-law, sons-in-law, daughters-in-law; likewise children of another marriage, and fathers and mothers who are so only by their marriage with the testator, (*stief eltern.*)

Fathers and mothers have likewise a right to substitute the children to one another, but they have no power to substitute strangers to them, even though the substitution were made to the advantage of the children.

Neither have they a right in these wills to make legacies, feoffments in trust, &c. to strangers, even though witnesses were called to them, or though their father should write the clause concerning the legacy with his own hand, or though the legacy were made

in favour of a pious community : such a settlement is null with regard to strangers, and subsists only among the children, who shall divide among themselves, by equal portions, the legacies made to strangers.

§ 21.

When a father or a mother shall make two such wills, and shall not make it evident at what time they were made, none of the two can subsist; but, if one of the two wills be dated, it alone shall be valid; if they be both dated, the last shall have the preference.

§ 22.

When it is denied that the will produced is written by the father's own hand, the person who affirms that it is the father's writing must prove it.

§ 23.

When the will cannot be valid as a paternal will, neither shall it be valid so far as it contains the division of the effects made by the father among his children, (*ut divisio paterna inter liberos*); for we abolish that distinction, which has no foundation in the laws, and is liable to several inconveniencies. Fathers and mothers, whose settlements cannot subsist, ought to blame themselves for not having regulated the division of their effects among their children, by a solemn will, or, at least, by a paternal privileged will.

A R T. III.

Of wills made in time of pestilence, or other contagious distempers.

§ 24.

THE privilege of a will made in time of pestilence, shall take place in these two cases, 1.) When the testator

testator himself shall be seized with it; or 2.) When the house where he stays shall be infected with it.

§ 25.

A man is not then allowed to use this privilege, only because the pestilence rages in the place where he wants to make his will; the reason of which is, that the motive for granting this privilege to the inhabitants of places infected, was the difficulty of finding, for the subscription of the will, seven witnesses, who were not infected; whereas the danger is not the same, since one is obliged to employ but a few members of court for the making of a will.

§ 26.

The privilege of a will made in the two cases above mentioned shall consist in this; namely, that the testator shall not be obliged to observe any solemnity in it, and that it shall be sufficient, if it be written and signed with his own hand, and if he have added the year and day to his subscription.

§ 27.

When the testator shall not be in a condition to write down his last will, he shall be obliged to make his will judicially, according to the common law; and, for that purpose, he shall cause himself to be carried near to a window, or to the street-door, whence he shall declare his last will to the members of court, who shall stand in the street near to the house.

If the testator do not make his will in the manner prescribed, but if he declare it in another way, for example, in the presence of witnesses, the will shall not be valid. The reason of which is, that, in circumstances so melancholy and troublesome, the testator may easily be deceived or induced to make a will; and the testator can, at any rate, blame only himself for not having made his will, as soon as the pestilence

lence began to appear, or even before, and for having waited the last extremity before disposing of his effects.

§ 28.

In such a will, there must likewise be a nomination of an heir, the children, and the fathers and mothers, must be expressly appointed heirs, at least, in the legitim, or must be disinherited, it not being sufficient that the heir nominated should offer to them the legitim afterward.

§ 29.

The person who asserts that the will was made at a time when the testator was seized with a pestilence, or even when the pestilence was in his house, is obliged to prove those facts.

§ 30.

Wills made in time of pestilence continue in force but a year and a day after the contagion ceases, and the communication is opened again. A testator who survives that space, and who wants his settlement to continue valid, is obliged to renew it according to the common law.

§ 31.

The privilege mentioned in this article shall be extended, and with very good reason, to purple fevers, to the dysentery, and other contagious distempers.

When such diseases rage any where, it shall be sufficient, in time of the court's vacation, (*justitium*), if the testator write down his testamentary settlement in the manner just prescribed.

§ 32.

The Canon law grants several privileges to wills made in favour of pious communities; but having, for good reasons, abolished those privileges, pious communities

munities shall be obliged to submit themselves, in regard to wills, to what is prescribed to our other subjects.

§ 33.

We have already declared above, that no pious community can be appointed heir for an immoveable subject, nor acquire one by a deed among the living; it has also been decreed, that, whether by will or by deed among the living, nothing can be given them above five hundred rix-dollars. See above, book VII. title II. § 10.

§ 34.

Neither shall peasants enjoy any particular privilege, but they shall be obliged also to make their wills judicially, before the justice or judge, to whom shall be joined a notary, and the pastor, or the mayor of the village. See above, book VII. title II. § 19.

§ 35.

Some lawyers have pretended, that such as make voyages by sea, and die on board a ship, ought also to be allowed to make their will without observing any solemnity; but we do not find that there is the least foundation for such a pretence; and those who undertake such long and dangerous voyages, ought themselves to be blamed for not having made their will before engaging in them.

T I T L E XII.

Of codicils, codicillary clauses, and the donation in prospect of death.

§ I.

CODICILS are an invention of the Roman laws, which has served only more to perplex the subject of wills.

Codicils

Codicils are settlements in which a man, without appointing an heir, orders several things to be executed after his death; which, according to the Roman laws, might be done in writing, or by words, observing certain solemnities, and, in particular, that of making such a settlement in presence of five witnesses.

§ 2.

The Roman lawyers have carried their refinement still further, by distinguishing between a codicil which had been confirmed by a will, and a codicil which had not been so confirmed. They have declared, in the first case, that, when the testator should add in his will this clause, *That he understands and intends that all the settlements which he shall make afterward be observed, as if they had been inserted word by word in the will*; those settlements in which the testator should not dispose of the succession itself, but other things to be executed after his death, should be valid, without any solemnity.

§ 3.

The codicillary clause has also been contrived, by which a testator orders, *That if his settlement cannot be valid as a will, it may be valid as a codicil, trust-deed, or otherwise, in the best form that it may be valid*; and this clause had that effect that a will which had not the requisite formalities was valid as a codicil, &c.

§ 4.

In fine, they have invented another way of disposing of one's effects entirely useless, and even pernicious, called a donation in prospect of death, which took place when a man, induced by the thoughts of death, gave any thing to another in presence of five witnesses; and, to render the confusion more complete, they have reckoned those donations deeds taking

king place among the living with respect to the manner of executing them, and with respect to their form, (*quoad modum et formam*), while they reckoned them among testamentary settlements, with respect to their effect.

§ 5.

As our intention is, on one side, to abolish in this body of law all the subtilties of the Roman law, and to cut off by the root all that may administer subject for chicanery; and as, on the other side, we do not reckon it an useful and necessary thing much to favour testamentary settlements, which, for most part, raise divisions in families, and deprive of successions those who are called to them by nature, and by the family-right, to whom our intention is to preserve them as much as shall be possible; we will and ordain, that all settlements of last will, though there be no mention in them of the succession, which cannot be disposed of but in a judicial will, be nevertheless also made judicially. Our will is also, that the solemnities prescribed for wills be observed in them, and therefore, for the future, no codicil, whether confirmed by the will or not, shall be valid, unless it be made before a judge.

§ 6.

We ordain likewise, that, though the codicillary clause be added to a will, it cannot make the will valid, if it want the solemnities prescribed for a judicial will, and that the testator cannot remedy it, but by making another will according to the prescribed rules.

§ 7.

Our will is also, that donations in prospect of death cannot be made but judicially, and that such a judicial settlement be reckoned a deed among the living, made with power to revoke it, (*pro actu inter*

vivas sub lege revocandi.) We shall treat of this more plainly in part III. on the article of donations.

T I T L E X I I I .

Of the conditions under which the nomination of an heir may be made.

(De conditionibus institutionum.)

§ 1.

A Condition is nothing else but an expression or declaration, (*oratio*), by which the testator refers the execution of his settlement to an event, of which it is uncertain whether it shall exist.

§ 2.

We are to judge of the conditions by the testator's intention; they are expressed usually by the words, *if, in case, after, till, &c.*

§ 3.

We are not to reckon as a condition, 1.) One which is already included in the settlement, whether by virtue of the law, (*ex dispositione legis*), or by the nature of the thing itself; for example, when a fief becomes forfeited on account of felony, we understand, by virtue of the law, the tacit condition, *if the superior incline to take advantage of his right*. Likewise, when a man has bequeathed to him *the fruits which shall arise*, (*fructus nascituros*), we understand, according to the nature of the thing, (*ex natura rei*), the tacit condition, *if fruits in fact happen to arise*.

Such tacit conditions shall not be reckoned conditions, even though they were expressed formally in the settlement.

§ 4.

§ 4.

Neither shall that be reckoned, 2.) As a condition which supposes an event certain; that is to say, present, or already happened, because there is no uncertainty in this case; in fact, if the event have already happened, the heir is immediately obliged to perform the testator's will, or else, if the case have not yet existed, the condition of the settlement failing, the settlement itself is ineffectual.

§ 5.

Neither is it our will, 3.) That these be reckoned for conditions, which, of their own nature, are impossible, or shameful, (*turpes*), and which consequently the laws do not permit to be fulfilled.

N. 1. When such conditions are imposed on the necessary heirs, namely, on fathers and mothers, and on children, they shall be regarded as if they had not been added to the settlement, (*pro non adjectis*.) But if they have been imposed on the heirs whom a person is at liberty to appoint, (*heredibus voluntariis*), all the settlement shall be annulled. The reason of which is, that the testator, by imposing on them such conditions, is reckoned to have declared very formally, that it is no more his intention to have them for his heirs, than it is in their power to perform such impossible and scandalous conditions. Wherefore also the legacies, even of such a will, shall not be valid.

N. 2. That law-suits may not arise concerning what is to be understood by conditions which are scandalous, and of a nature impossible to be fulfilled according to the laws; we decree that they shall be such as import a public, private, or extraordinary crime, (*delictum publicum, privatum, vel extraordinarium*), a subject of which we shall treat in the fourth part of this work.

N. 3. When therefore the conditions are only contrary to good manners, for example, when a man shall be appointed heir, on condition that he shall be Roman Catholic, or Protestant, the settlement shall not be annulled thereby; but no regard shall be paid to the condition which shall be reckoned as if it had not been annexed, (*pro non adjecta*.) The case would be otherwise, if any of our subjects appointed for his heir a stranger of the Roman-Catholic religion, on condition that he shall become Protestant: in such a case that stranger heir shall be obliged either to fulfil the condition, or else to renounce the succession; which shall be executed by right of reprisals, (*jure re-torsionis*), as it is known that our subjects of the Protestant religion, who are appointed heirs in Roman-Catholic states, on condition of becoming Roman Catholics, are also obliged to fulfil the condition, or to renounce the succession.

N. 4. The decision shall be the same as in the preceding article, when the condition on which the nomination of an heir is made shall be extravagant and ridiculous; for example, when the testator shall appoint one for his heir on condition that he shall throw his body into the sea near Hercules's pillars; that sort of conditions are likewise regarded as if they had not been annexed.

N. 5. But the condition is not against good manners, when one appoints a man his heir, *in case he marry Caius's daughter, or take a wife of the choice of a third party* mentioned in the deed.

For either the heir is ready to fulfil the condition, by marrying Caius's daughter, or by taking a wife of the choice of the third party, in which the condition is reckoned to exist, though Caius's daughter will not marry him, or the third party will not give him a wife; for it does not depend upon the heir to fulfil the condition.

Or

Or else the heir refuses to marry Caius's daughter, or to take a wife of the choice of the third party, in which case the condition does not exist, and consequently the nomination of heir cannot subsist.

§ 6.

In fine, that shall not be reckoned as a condition, 4.) which is so obscure, confused, and perplexed, that it cannot justly be known what was the testator's intention, and what he meant to say; therefore it shall be regarded as if it had not been annexed, whether the question be with necessary or with stranger heirs.

§ 7.

I. All conditions are either casual, (*casuales*), or in one's power; that is to say, that they are possible to him on whom they are imposed, (*potestativa*), or mixed, (*mixtae*.)

Casual conditions (*casuales*) are such as do not depend on the will of the heir appointed, but on chance, (*casu*), or on the will of a third party; for when the testator makes the condition to depend on the will of a third party, the heir is obliged to wait till the third party have fulfilled the condition.

Possible conditions (*potestativa*) are such as the heir may fulfil if he pleases.

Mixed conditions are such as depend in part on chance, (*casu*), and in part on the will of the heir, or else in part on his will, and in part on that of a third party.

§ 8.

II. Conditions are distinguished, in the second place, into suspensive (*suspensivas*), and resolute (*resolutivas*.)

Suspensive conditions (*suspensivæ*) are such as make the whole settlement depend on a future event; for example, when a testator appoints one for his heir, in case a ship arrive from Asia: that condition suspends the

the effect of the settlement, and the heir has no right till the ship arrive from Asia.

Nevertheless, the hope that the ship may arrive is something real, which makes a part of the heir's riches, and gives him the right to expect the event, which has several effects, namely, that security ought to be given him by the heirs intestate, that he may be put in the succession, on giving security to restore it on failure of the condition, (*de restituendo deficiente conditione*), or that it ought to be sequestered, and especially that he transmits his hope to his heirs, even though the condition might have been in his own power, (*potestativa*), unless it were annexed to his person, for example, if he had been nominated on condition of marrying Seius's daughter, &c.

A resolute condition (*resolutiva*) is that which takes place when a deed which is perfect and complete transmits immediately an effectual right to heirs, but on condition that the deed shall be reduced, if such an event, of which it is uncertain whether it shall exist, happen; for example, when a testator appoints an heir, but adds the clause to his will, that if his own son whom he has lost be found, he inclines that his son be his heir.

§ 9.

A testator may impose all the conditions above mentioned on those whom he appoints his heirs, and consequently also on the substitutes, excepting necessary heirs; that is to say, such as are necessarily to be appointed heirs, or disinherited, who cannot be appointed heirs but on a condition within their power.

N. 1. Thus when a father appoints his son his heir, or the son his father, on a casual or mixed condition, the whole will is null, because the condition might not exist, and consequently the necessary heirs would in that case be passed over in silence.

The

The case would be otherwise if the necessary heir, after being appointed heir, had been disinherited under a casual or mixed condition : thus when a father appoints his son his heir, *in case a ship arrive from Asia*, the whole will is invalid, because the son would be omitted in case no ship arrive ; but if the testator, after having appointed his son heir, declare, that if no ship arrive, the son shall be disinherited, the testament shall subsist, because the son was expressly by name disinherited. In this case the son can only get the will invalidated on a complaint of undutifulness, and the legacies of such a will would be valid, (*querela inofficiosi testamenti salvis legatis.*)

N. 2. On the contrary, the condition is valid, if it be possible to be performed, (*poteſtativa*) ; that is to say, if it depend upon the pleasure of the children to fulfil it in order to obtain the succession ; so they would be reckoned tacitly to renounce the succession if they refuse to fulfil the condition.

Cases however may happen in which it is not even allowable to impose on necessary heirs a condition in their power ; for example, where a father nominates his son only for his legitim, he could not impose upon him the condition of going to Rome ; the reason of which is, that the legitim ought to be left to children without any burden : nevertheless, in such a case, the settlement would not be null, but the condition would be reckoned as if it had not been added.

N. 3. Moreover, we have seen above, that it is one of the privileges belonging to the military that a soldier has a right to nominate his children even on casual and mixed conditions.

N. 4. When the heir does not perform the condition, whether by chance, (*casu*), or by his own fault, the whole disposition is null.

But when the condition does not exist by the fault
of

of a third party, in whose person the condition is to be fulfilled, or by the fault of one who has any interest that it be not fulfilled, it shall be reckoned as performed, (*pro impleta.*)

N. 5. In case an heir happen to die before performing the condition which was in his power, (*potestativam*), a distinction must be made whether the heir appointed on a condition have a substitute or a coheir, or if he have none; if he have a substitute, (*substitutum*), the will is not invalid, but the substitute succeeds; if he have no substitute, the will is null, and the heirs succeed intestate: if he have a coheir, the will subsists with respect to that coheir; but with respect to the heir appointed, the condition not having been fulfilled, his portion, or his share, returns to the heirs intestate, or the heirs at law.

§ 10.

We have already declared that a testator had a right to impose this kind of conditions on heirs substituted; here is still another such condition, namely, when a testator appointing Caius his heir, substitutes Mævius to him, *in case he happen to die without children*. In this case, in effect, it is evident that the grandchildren are likewise included; so that if the heir does not leave children, but grandchildren, the condition fails, and consequently the substitution is without effect.

It must however be observed concerning this condition, that it has occasioned several questions on which lawyers have been much divided; for example, it has been disputed, 1.) Whether children in virtue of this condition are at the same time appointed heirs by the testator, and whether consequently they are so to be included in the nomination, that the father is obliged to divide the succession with them. We enact and ordain, that in such a case the testator shall not be reckoned

reckoned to have intended to appoint the children his heirs, and consequently the father shall not be obliged to divide the succession with them.

It is further asked, 2.) When a father nominating his son his heir, and substituting to him Caius, *in case he happen to die without children*, these children are to be reckoned nominated or omitted? Now, as we have decreed that the children included in the condition shall not be reckoned appointed heirs, and that the heir appointed shall not be obliged to divide the succession with them, it cannot be denied but that the children are omitted when the son dies before the father: whence it follows, that the will being null, there will be room for succession intestate, and for testamentary succession.

§ 11.

The effect of a condition is, that the heir is obliged to wait till its existence, and that he cannot act as heir before that happen.

N. 1. When a person has been appointed heir under different conditions, they must all exist before he can be allowed to succeed, if they be imposed jointly, (*conjunctim*); but when the testator expresses himself in a disjunctive manner, (*disjunctim*), it shall be sufficient if one of the conditions exist.

N. 2. When several heirs are appointed under a condition, if the object of the condition can be divided, for example, if the testator have appointed Seius and Caius for his heirs, on condition of *paying a thousand rix-dollars to Mævius*, it shall in effect be but one condition, and it shall be sufficient if the two heirs together make up the sum of a thousand rix-dollars, and pay it to Mævius: but if the object of the condition cannot be divided, for example, if the testator have appointed Seius and Caius his heirs, in case they go to Rome, they are two conditions,

and each of the heirs shall be obliged to fulfil the condition by going to Rome.

N. 3. The condition exists also when a third party fulfils it; for example, when one is appointed heir on condition of paying a thousand rix-dollars to Mævius, and that he causes them to be paid by a third party.

The case is otherwise when the condition consists in doing a thing, (*faciendo*); for in this case the condition does not exist till the person on whom it is imposed performs it.

N. 4. The condition which consists in doing a thing, and which is in the power of the person on whom it is imposed, (*conditio potestativa faciendi*), is reckoned performed, (*pro impleta*), when it cannot be accomplished, either by chance, (*casu*), or by the fault of a third party, and when consequently it does not depend upon the heir to perform it.

The case is otherwise when the condition is impossible or scandalous, (*turpis*); for in that case the settlement is null. See above.

N. 5. When the condition which is in the power of the person on whom it is imposed consists in not doing a thing, (*conditio potestativa in non faciendo*); for example, when the testator appoints one his heir, *in case he do not go to Rome*, the condition does not exist till after his death; for it is properly then only that it is certain he shall not go to Rome.

N. 6. When the testator shall appoint one his heir, *in case he follow learning*, it shall not be necessary to proceed so far in it as to take the degree of Doctor, but it shall be sufficient for fulfilling the condition if he pass his classical course, and study two years in an university.

N. 7. It is requisite usually that the condition do not exist till after the testator's death, as it is not sufficient that such a case happen in his lifetime.

Nevertheless, if it be a condition which is in the power

power of the person on whom it is imposed, (*poteſtativa*), it ſhall be ſufficient that what the teſtator deſired at imposing the condition have really happened, though it be even in his lifetime.

Thus when a teſtator has appointed Caius his heir, *in caſe he apply to learning, or embrace the Proteſtant religion*, the condition ſhall be held as fulfilled, if before the teſtator's death Caius had already finiſhed his ſtudies, or were already become of the Proteſtant communion.

§ 12.

The condition is to be fulfilled in the manner expreſſed, and it is not ſufficient to perform it in an equivalent way, unleſs the teſtator's intention be fully answered thereby: if the caſe be doubtful, the judge ſhall determine it.

§ 13.

The conditions which conſiſt in giving or in doing a thing, and which are in one's power, (*conditiones poteſtativæ dandi et faciendi*), may be performed at any time, even at the point of death, (*in articulo mortis*); but the condition muſt really be performed, as it is not ſufficient that the perſon on whom it is impoſed ſhould make the neceſſary preparations for its being done after his death. The caſe would be otherwiſe, however, if the performance of the condition had not depended on himſelf; for example, if having timeouſly made the proper preparations for performing it, he had been prevented by death.

If this condition be limited to a certain time, for example, if it bear that Caius ſhall be heir *in caſe he pay a thouſand rix-dollars to Seius within the ſpace of three months*, it muſt be exactly performed within the time preſcribed; and if Caius have not paid the thouſand rix-dollars within the three months, the no-

mination shall be null, and the heirs intestate or at law shall obtain the succession.

§ 14.

When the testator does not appoint an heir on a certain condition, but at a certain time, that is to say, by fixing a certain day, (*sub die*), a distinction must be made whether the nomination of heir were determined, 1.) To an uncertain day, of which it is not surely known whether it shall exist, nor when it shall exist, (*sub die certo an et quando*); or, 2.) To a certain day, of which it is known surely that it shall exist, but of which it is not known when it shall exist, (*sub die certo quod sit exstiturus, etsi incertus quando*); or, 3.) To exist after a certain day, that is to say, reckoning from a certain day, (*ex die*); or, 4.) To exist till a certain day, (*ad diem*.)

I.) First, when the testator appoints an heir at an uncertain day, of which it is not surely known whether it shall exist; for example, when he says, I appoint Caius my heir *when he shall be sixteen years old*, it is a real conditional nomination, because Caius may die before the age of sixteen years, and consequently the condition may not exist; much more is it the same when not only it is not known whether the day shall exist, but neither is it known certainly when it shall exist, (*an et quando exstiturus*); for example, if the testator appoint Caius his heir *when Titius shall die*; for in this case it is first uncertain whether the day shall exist, as the heir may die before Titius; and it is also uncertain when the day shall exist, since the day of Titius's death is not known.

II.) The second case is, when the testator appoints Caius heir at a certain day, which it is known shall surely happen, but of which it is not known when it shall happen, (*quando sit exstiturus*); for example, when the testator appoints Seius his heir, *when Caius shall*

shall happen to die; in this case it is sure that Caius shall die, but it is not known when that day shall happen; and indeed that day is not regarded as a condition, but the settlement is pure and simple, (*pura*), which acquires its full and entire effect at the moment of his death, to which the delivery of the succession is delayed by the testator.

In fine, when the testator appoints Caius to be his heir after a certain day; that is to say, reckoning from a certain day, (*ex die*); for example, *when he is not to succeed till a year after the testator's death*, or till a certain day, (*ad diem*); for example, *when he is not to be heir but for a year*; in this case the Roman laws reckoned such nomination of heirs as pure and simple; the reason of which is, that, according to those laws, one could not die partly testate and partly intestate.

So they had no regard to the day, which was reckoned as if it had not been added.

But having already declared above, that our will is no longer to admit that rule, and that our intention is, that the testator's will should only be followed, the consequence is, that as the testator gives his succession only after a certain time, or intending only to leave it for a certain time, the succession ought to belong, in the first case, to the substitutes, or heirs intestate, till the day come; and in case the latter will not have it, a curator or trustee must be appointed for the inheritance, (*curator hereditatis*), who shall be obliged to deliver the incomes to the creditors, and to keep an account of them. In the second case, namely, when the testator grants his succession, but, for example, for a year, after the year is elapsed, it must be delivered either to the substitute, or to the heirs intestate or at law.

T I T L E XIV.

Of the opening and publication of wills.

§ 1.

AS it is proper that such as are appointed heirs in a will be acquainted of it, and as it often happens that the heirs intestate do not take the trouble to cause the wills to be opened, by which the heir appointed is deprived of his right, and the legacies; especially such as are made in favour of pious communities, remain unknown, it is necessary that wills be opened.

A distinction must be made on this head between a judicial and a privileged will.

§ 2.

As to a judicial will; the following persons may require it to be opened, namely, 1.) The heirs intestate or at law; 2.) All such as have any interest in the will, for example, when they presume that it contains any legacy in their favour, in which case however they are obliged to give their oath of calumny; (*de calumnia*); 3.) The fiscal, to know if there be no legacies for pious uses; 4.) The judge, where no body offers, within the space of a year and a day, to demand the will to be opened, may proceed in it by his office, after having caused the heirs intestate or at law to be cited by advertisements affixed to stated places by way of edict, (*per edictales.*)

§ 3.

The opening of a will shall be demanded in the court which made or received it.

§ 4.

When the testator shall die a violent death, his will

will cannot be opened, nor the succession delivered, till the judge have previously taken cognisance of the circumstances of his death.

§ 5.

Usually a will cannot be opened till four weeks after the testator's death, because it is necessary to cause the heirs intestate to be cited to that act.

Nevertheless it may be opened sooner, if recourse must be had to the will to know a thing, or if there be danger in the delay; for example, if information be wanted in what manner the testator has declared his intention of being buried, &c. In such cases the judge may consult the will, give, in consequence, a resolution to the person who has applied to him, and afterward seal the will with the seal of court.

§ 6.

When the heirs are summoned, and a day fixed for opening of the will, it must be opened and published at the same time, and on the same day; as the opening and publication must be performed in one and the same deed.

§ 7.

All wills shall be opened and published before the judge, whether they be public or privileged, and even though one should offer himself to protest against such an act, and should pretend that the will is invalid.

Moreover, the original will must be opened; and, if several originals have been executed, it shall be sufficient to open one of them.

§ 8.

The will must be published entirely, unless the testator have made some private settlement in a separate and sealed writing, and unless he have discharged it to be opened before a certain time: the case would be the

the same, if he had made use of injurious expressions against the heirs, or against other persons, &c. which shall be omitted in publishing the will.

§ 9.

After a will is published, the judges shall mark upon the will, that it has been published (*publicatum*), with the date on which the publication was made, and the name of the person at whose instance it was published: the judges shall also give copies to such of those concerned as shall demand them.

When the heirs shall demand that the original be sealed again, the judges shall comply with the demand, and shall mark on the cover that they have been required so to do.

§ 10.

With respect to privileged wills written with the testator's own hand, and kept by him, our will is, that those who shall find them among his papers inform the judge of them, and deliver them to him, whether open or sealed, that he may observe what shall be necessary, agreeably to what has been prescribed above concerning the opening and publication of wills; and when the privileged will shall be found sealed, no one, not even the children of the testator, would have a right to open it of their own authority.

When the testator shall have intrusted his privileged will to a third person, and shall deposit it with him, the latter shall be obliged to deliver it to the judge after the death of the testator: if he do not so, the heirs intestate, and others concerned, may oblige him to do it, and the judge shall proceed to the publication of the will in the manner prescribed.

§ 11.

The original of a will ought never to be restored

to the heirs under any pretext whatsoever, neither before nor after the publication, supposing even that all the heirs intestate, or at law, should consent to it.

§ 12.

If any person suppress a will, whether public or privileged, he shall forfeit all that might fall to him of the defunct's effects, and shall besides be punished corporally.

T I T L E XV.

Of entering upon the inheritance, of the right of deliberating, (de jure deliberandi), and of the benefit of an inventory, (de beneficio inventarii.)

§ 1.

WE have seen in the preceding books, that successions are conveyed, either intestate or by will, or in virtue of statutes, or by an agreement: it is necessary in all those cases, that the person to whom a succession has fallen behave as heir, or declare himself heir; as no succession can be acquired but by entering on the inheritance.

§ 2.

According to the Roman laws, a distinction must have been made between one's own heirs, (*suos*), and stranger-heirs, (*extraneos*); for successions were acquired by one's own heirs, in another way than by stranger-heirs.

§ 3.

Children are called one's own heirs, who, at the time of their father's death, are in his power, and in the first and nearest degree. Stranger-heirs are all such as not being one's own heirs, (*sui*), are conse-

quently strangers to the father, or, they are such as, at the time of the father's death, are not in his power, nor in the nearest degree.

§ 4.

It was not necessary that one's own heirs, (*sui*), that is to say, such as, at the father's decease, were in his power, and in the nearest degree, should behave themselves as his heirs; for they were his necessary heirs, (*necessarii heredes*); they continued in his family, and entered upon his right, even though they had no knowledge of his death: they were also to be their father's heirs, contrary to their inclination, and could not consequently renounce their paternal succession, unless their father had allowed them, which he was also reckoned to do, when he appointed them heirs, under a condition which was in their own power, (*sub conditione potestativa*), or substituted to them while under pupillarity.

And though the prætor afterward allowed them the benefit of abstaining from the succession, there still remained subtle and perplexing consequences of the necessary existence of an heir, (*necessariæ existentie heredis*), which have occasioned endless disputes, and afford, even at this time, subject for very many lawsuits.

Stranger-heirs could not acquire the succession but by a free declaration that they wanted to be heirs.

§ 5.

We have found that it was necessary to abolish the distinction between one's own heirs and stranger-heirs, (*inter suos et extraneos*), with respect to entering upon the inheritance, and to allow it to subsist only in this particular; namely, that one's own heirs are necessarily to be appointed heirs or disinherited; willing, moreover, that the succession cannot be acquired,

quired, either by the one or by the other, but by an entry upon the inheritance formally made.

Entry upon the inheritance (*aditio hereditatis*) is the declaration of an heir capable of succeeding, by which he declares that he wants to accept the succession which has fallen to him, that is say, that he wants to be heir.

§ 6.

This declaration may be made, either verbally or really, (*facto*.)

§ 7.

So there is required for an entry upon an inheritance,

I.) A free will; whence it follows that nobody can be constrained to accept a succession: which is so much the better founded, that, in cases, in which, for the preservation of the legacies, an entry is requisite, the succession is by law reckoned accepted, (*ipso jure pro adita*.)

But this entry, which is made by law (*ipso jure*), has no other effect than to hinder the will from falling for want of an heir; consequently, the feoffment in trust, or trust-estate, shall be restored to the heirs feoffees in trust, in the same way as if the heir intrusted with the feoffment, or trust-estate, (*fiduciarius*), had accepted; and therefore also the legacies are valid.

§ 8.

II.) It is requisite, in the second place, that the heir be informed that a succession is fallen to him, whether intestate or by will, or by statute, or by an agreement; for no one can declare his inclination concerning a thing of which he has no knowledge.

§ 9.

III.) It is requisite, in the third place, that the heir be capable of declaring his inclination, and that

he have consequently the capacity to accept a succession.

He must also have this capacity, not only at the time of making the will, but also at the time of the testator's decease, and at the time of entering upon the inheritance.

The incapacity which shall happen in the intervals between those times, shall occasion him no prejudice.

Whence it follows, that, if the heir have been proscribed after being appointed heir, and were re-established before the testator's death, he shall have a right to behave himself as heir: likewise, when, having been proscribed before the testator's death, he was restored before entering upon the inheritance, he shall still have a right to accept of it.

§ 10.

IV.) It is requisite, in the fourth place, that the heir be capable of contracting an obligation or an engagement: the reason of which is, that, in taking upon him the title and quality of heir, he binds himself to the creditors of the succession. Therefore a pupil cannot declare himself heir without the authority of his guardian, nor a minor, or prodigal, &c. without the consent of his curator.

§ 11.

A pupil who is past the age of infancy, (*infantia major*), may accept a succession with the consent of his father; if his father will not consent to it, the declaration of the pupil shall be confirmed by the decree of the judge.

§ 12.

A son who has attained man's age may accept a succession, even against his father's inclination, and, in this case, it shall constitute a part of those effects of the son, which are called an adventitious and extraordinary

traordinary peculiar, (*peculium adventitium extraordinarium*). But, when the son accepts the succession with his father's consent, it makes part of the adventitious peculiar, of which his father has the usufruct. When the son will not accept the succession, if the father himself be declared heir, he shall acquire the succession in full right, (*pleno jure.*)

§ 13.

V.) It is requisite, in the fifth place, that the succession be in fact fallen to the heir, that is to say, that the testator be dead.

§ 14.

VI.) It is requisite, in the sixth place, that the heir have the intention (*animus*) to behave as heir.

This intention is not presumed as long as the space for deliberating (*tempus deliberandi*) continues: therefore he shall not be reckoned heir, even though he had, during that time, done several deeds as heir.

With respect to the space for deliberating, and the time that it lasts, see below, art. I. and the new Frederician Code, in which this subject has just been regulated *.

It thence follows, that it will be needless, for the future, to examine what are the deeds of heirs, which import entering upon the inheritance, as the heir is to declare himself during the space prescribed.

§ 15.

VII.) It is requisite, in the seventh place, that the heir declare his intention purely and simply, as it is not allowable for him to accept the succession only conditionally; for it cannot be demanded of the creditors of the succession that they should wait till the condition exist.

§ 16.

The heir may also make his declaration by another,

* See note, p. 170. above.

and accept the succession by his means, but the person who accepts it for him must be furnished, for that purpose, with special powers.

§ 17.

When the heir happens to die before declaring whether he will be heir, he transmits his right to his heirs, be they his own heirs or strangers, who may still, during the space for deliberation, (*intra tempus deliberandi*), declare themselves heirs.

§ 18.

The object of the entry is a succession or inheritance falling, which has not been rejected.

The person who accepts a part of the succession is reckoned to accept it entirely; thus a son who shall demand the fief shall be reckoned also heir of the allodial effects.

The case would be otherwise, if one, satisfying himself with the dowry, rejected the rest of the succession: for, in this case, he shall not be reckoned as heir, nor obliged to collate, communicate, or divide the dowry, provided the children have their legitim otherwise, (*salva legitima*.)

§ 19.

An heir may, as soon as a succession is fallen to him, behave himself as heir; but the creditors have no right to sue him, till nine days after entering upon the inheritance.

§ 20.

The effect of the entry is, 1.) That, from the moment of the decease, the heir and the defunct are reckoned but as one single person.

2.) That the heir acquires a hereditary right on the whole succession; a subject which has been treated in the title concerning the action called *petitio hereditatis*.

3.) That

3.) That he acquires all the rights which the defunct enjoyed, and which have not been extinguished by his death.

4.) That when nobody is in possession of the succession, the heir may seize it of his own authority.

But when the succession shall be in the hands of another, the heir shall be obliged to beg the assistance of the courts of judicature to be put in possession.

5.) That the heir is bound to the defunct's creditors; for all actions which were good against the defunct may be raised against his heir, unless the action were restrained to the defunct's person.

6.) That the heir is obliged to pay the legacies, &c. and that the laws allow the legataries different actions for procuring those legacies; namely, *actiones ex testamento, rei vindicationem, hypothecariam, &c.*

§ 21.

Heirs are at liberty, be they one's own heirs or strangers, to reject a succession, and to renounce; and they may likewise make known their intention in that respect verbally or really (*verbis vel factis*). A declaration is made really (*ipso facto*), when the person who is appointed heir by the will is satisfied with the legitim.

§ 22.

It is requisite, for the validity of such a renunciation, a) That the succession be really fallen, or that one have renounced, by an agreement, a future succession. See above, tit. X. § 7. b) That the heir have not yet taken the quality and title of heir; for, if he have once accepted the succession, the creditors have an acquired right in them, which he cannot prejudice.

This rule however admits an exception, with respect to the necessary heirs and their heirs, who have a right to accept a succession, which has not been accepted

accepted by their father and mother; for the necessary heir transmits all his rights to his heirs, which does not take place with respect to the stranger-heir.

2.) This rule further admits an exception, when the heir happens to die within the space for deliberation, (*intra tempus deliberandi*); in which case stranger-heirs even have a right in them, which they transmit to their heirs.

§ 23.

Though the heirs appointed be at liberty, whoever they be, to accept a succession, or to reject it, it is nevertheless evident that they cannot renounce it to the prejudice of the legataries.

That the heirs feoffees in trust, legataries, &c. and their heirs may not lose by the deed of the heir appointed, what the testator has left them by his will, our will is in that respect, that the testament be not annulled for want of an heir, but that all which the testator has ordered, with respect to other persons, be executed by the heirs intestate or at law; or, failing them, by the curator of the succession, without examining whether the heir appointed have rejected the succession fraudulently or fairly, and on a just cause, (*dolo vel bona fide, et ex justa causa.*)

§ 24.

Thus legataries shall have an action *ex testamento*, and a claim against those who are in possession of the succession, or who fraudulently may have lost possession of it, to oblige them to deliver what the testator has left them, and to execute his settlements. This action shall likewise be good against the possessor's heirs, in so far as they shall accept the succession, and be enriched by it.

§ 25.

When a wife who shall be appointed heiress shall renounce

renounce the succession, because she is wronged in the *statutory* portion, the will, notwithstanding the renunciation, shall subsist as to the legacies, which the heirs intestate or at law shall be obliged to pay.

§ 26.

When the heir shall renounce the succession, after having received money for that purpose, (*accepto pretio*), or shall sell the succession, the legataries shall adhere to the will, and to the person who is in it appointed heir.

§ 27.

When the heir appointed renounces the succession, which is conveyed to him by will, it does not follow that he renounces it also in quality of lawful heir, (*ut heres legitimus*), if he be heir at law, or intestate. The case would be otherwise, if, before rejecting the will and succession, he had demanded his legitim intestate, in which case he would be reckoned to renounce both the testamentary succession, and that which should fall to him intestate.

As it often happens that a person to whom a succession has fallen, whether intestate or by will, by an agreement or by statute, is afraid to take the title of heir, before being informed of the extent of the succession, we have allowed to heirs not only a space for deliberation, (*spatium deliberandi*), but also the benefit of an inventory, (*beneficium inventarii*;) which is to be the subject of the two following articles.

A R T. I.

*Of the space for deliberating.**(De spatio deliberandi.)*

§ 28.

THE right of deliberating (*jus deliberandi*) is the power or permission which an heir has of examining, during a certain time prescribed, the state of the succession which has fallen to him, to know whether it be proper for him to accept it purely and simply, or to accept it only under benefit of an inventory, (*sub beneficio inventarii*), or even to reject it.

§ 29. 30. and 31. *

We think proper to shorten the space of a year for deliberation, (*annum deliberandi*), and to grant for that purpose to heirs a space of six months, to be reckoned from the time that they are informed a succession has fallen to them, during which space they are to inform themselves of the state of the succession, draw up an inventory of it, present it to the judge, and declare upon what footing they intend to be heirs, as is prescribed in the new Frederician Code †; in which shall also be shown what is to be observed when the heir shall not present the inventory within the time required, and shall not declare if he intends to be heir, and on what footing he accepts the succession. See above, § 14.

§ 32.

The heir shall be obliged to administer the effects

* The alterations here and in some other places were made by his Excellency my Lord High Chancellor himself, [Baron Cocceius], on revising the translation.

† See note, p. 170. above.

of the succession during the space for deliberating, and to take care of its preservation; he shall not however have a right to alienate any subject of the succession without the participation and consent of the judge; if he be afraid to take upon him the administration of the succession, he may demand of the judge competent to establish a curator for the jacent succession.

No heir can be sued by the creditors of the succession till the space for deliberation be expired.

This space does not take place when the heirs declare by word or by writing, as soon as a succession has fallen to them, that they intend to be heirs, in which case they may be sued nine days after entering upon the inheritance. See above, § 19.

ART. II.

Of the benefit of inventory.

(De beneficio inventarii.)

§ 33.

WE have allowed to heirs a space for deliberating, that they may inform themselves of the burden and extent of the succession; but as the examination thereof cannot be made without making out an inventory, and as besides both the heirs intestate or at law, and the creditors, have an interest in knowing the state of the succession, in case, the heir appointed not intending to succeed, the succession were to be delivered to the heirs intestate or at law, or that, the heir not intending to accept the succession but under benefit of inventory, the creditors were to be paid only out of the amount of the effects left by the testa-

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tor,

tor, it has been found equitable to oblige the heir to make an inventory of them.

§ 34.

An inventory is a particular account and description of all the things and subjects belonging to a succession.

§ 35.

This inventory is to be made and presented to the judge within the space prescribed by the new Frederician Code *.

§ 36.

All the heirs who are obliged to restore a succession, or who will not accept it but upon inventory, ought to make an inventory in form.

§ 37.

An inventory to be in form shall be drawn up by two members of court, or by a notary, in presence of two witnesses, and it shall not be necessary to call the legataries to it.

§ 38.

In the inventory shall be inserted all the things and subjects which make a part of the succession, whatever they be; at any rate it shall be allowable to take the heir's oath, that he has included and inserted all in it.

§ 39.

For the future there shall not be admitted what is called a sworn account of the effects, (*specificatio jurata*), because it is an unpardonable neglect in an heir, who knows that he is to restore a succession, or to satisfy the creditors in proportion to the amount of the succession, (*juxta vires hereditatis*), not to have taken at first an inventory; in which he is the more blameable, as common sense dictates to us, that an heir, when he is obliged to restore the succession after several months or years, &c. may very easily forget several

* See note, p. 170. above.

articles, and thereby do a prejudice to the heirs intestate, or to the creditors.

§ 40.

It is allowable for the heirs intestate, or feoffees in trust, to offer their remarks upon such an inventory legally made, and even to put the heir appointed upon his oath with regard to those remarks, even though he have already sworn to the whole inventory. If it be found that the heir has purposely omitted any article in the inventory, he shall be obliged to pay the double of the value to those concerned; if he have omitted it only through ignorance or inadvertence, the article shall be added at his expense to the inventory.

§ 41.

When the heir appointed, on delivering the inventory, declares that he will be heir under benefit of inventory, or when he is reckoned by law heir under benefit of inventory; see above, § 29. he shall enjoy the advantages following, to wit,

1.) He shall not be bound to the creditors of the succession, but in proportion to the amount of the succession.

2.) When things or subjects belonging to the succession shall perish without any fault of his, the creditors alone shall bear the loss, in case the effects of the succession be not sufficient to satisfy them.

3.) When the heir under benefit of inventory has claims against the testator, or is indebted to him, the claims of either shall not be confounded by the entry upon the inheritance, but the heir may procure to himself payment of his claims upon the succession, and the creditors may exact from him payment of what he owes to the testator.

4.) The heir appointed may deduct all his charges upon account of the inventory, and before declaring himself heir under benefit of inventory.

5.) But

5.) But he cannot demand the Trebellianic fourth; which we have entirely abolished.

6.) When the heir shall accept the succession only upon inventory, and consequently is afraid that the succession may not be sufficient to pay the burdens, and satisfy all the creditors, it shall not be allowable for him to pay one creditor preferably to another, nor to give in payment a thing or subject of the succession; but he shall be obliged to cause the creditors to be cited by edict, that they may get settled amongst themselves the order of their payment; otherwise if it happened that one or other of the creditors could not obtain his payment, the heir upon inventory would be obliged to be answerable to him for the whole.

§ 42.

When the heir shall not make his declaration within the space prescribed by the new Frederician Code*, what is there ordained on that head shall be observed.

§ 43.

When the heir shall declare his intention not to be heir, he shall be obliged to deliver the succession according to the inventory, either to the substitute, or else to the heirs intestate.

T I T L E XVI.

Of the collation or communication of effects.

(De collatione et de dotis collatione.)

§ 1.

AS natural equity requires that there be an equality in the division of the effects among the children, the laws have ordained on very good grounds,

* See note, p. 170. above.

that

that such of the children as have received in the lifetime of their father and mother a part of their effects, should bring them back, collate or communicate them after their decease; that is to say, join such part to the mass of the effects of the inheritance, to make of the whole one common stock, to be divided among them.

§ 2.

Collation of effects is then that deed of children, who having received some of their father and mother's effects while the latter were still alive, and wanting after their decease to have a share in their succession, collate, bring back, or communicate to the common mass of their succession all that they have received of it in their lifetime, that it may be deducted out of the portion which ought to fall to them.

§ 3.

That collation of effects may take place, it is requisite, 1.) That those who collate be children of the defunct; and, 2.) His heirs; 3.) That they have received some of their father's and mother's effects; and that, 4.) In their lifetime; and, 5.) That what they have received of them be still existent at the time of the decease of the person to whom they succeed.

§ 4.

I.) First, there are none but the defunct's children, and consequently his descendants, who are obliged to collate or communicate the effects they have received from him, be they emancipated, assumed, or adopted, by an ascendant, who ought also to collate what they have received from their adoptive father before he had adopted them.

§ 5.

Collation and communication of effects takes place also, whether the children succeed to their father or to their mother, observing however the distinction of
paternal

paternal and maternal effects; so that if it be the paternal succession, they collate only what they have received of their father's effects, and if the maternal succession, they collate only what they have received of their mother's effects.

Wherefore also children are not obliged to collate their profectitious peculiar, when they succeed to their mother's effects.

Children are also obliged to collate and communicate all that they have received of the testator's effects, even though they have been appointed heirs for unequal portions.

N. 1. When there are children and grandchildren, and when brothers come in competition with the children of a defunct brother, (*fratres cum fratrum liberis*), the latter are obliged to collate and communicate not only what their father and mother had already received from their grandfather and grandmother, but also what they received from them themselves.

That one of the grandchildren who may have renounced the succession of his father, or of his mother, must be excepted; in which case he would be obliged to collate only what he had received from the grandfather or grandmother to whom he wants to succeed.

N. 2. When all the children of the first degree are dead, and there are none but grandchildren, they shall collate and communicate only what they have received themselves from their grandfathers and grandmothers, and not what their fathers and mothers shall have received from them.

N. 3. The collation of effects does not take place among other relations who are not descendants; wherefore also fathers and mothers, as well as their brothers and sisters, when they succeed to one another,

ther, are not obliged to collate what they received from their children, or from their brothers, &c.

N. 4. It may also happen that children themselves may not be regarded as descendants, in which case they cannot be obliged to collation of effects; for example, when a father, whose daughter by the statutes is excluded from successions while there are males, appoints her heiress jointly with her brothers; the reason of which is, that that daughter is not regarded with respect to her brothers, as being among the descendants, but is reckoned a stranger, and consequently is not obliged to collate and communicate what her father gave her in his lifetime.

N. 5. Thence it follows, that stranger heirs who have been appointed heirs jointly with the children, are still far less obliged to collate and communicate what they have received from the testator in his lifetime.

§ 6.

II.) It is requisite, in the second place, that the children intended to be bound to the collation or communication of effects be the defunct's heirs, either intestate, or by will, or by statutes, or by an agreement.

N. 1. Thus when a son renounces his father's succession, and is satisfied, for example, with the donation in prospect of nuptials, or any such other advantage, he shall not be obliged to collate or communicate any thing whatever of what he has received in his father's lifetime, unless the other children were wronged in their legitim by an exorbitant donation in prospect of marriage, or by a portion or dowery, &c.; for in such a case these children might demand what is wanting of their legitim, by virtue of a complaint on account of an unreasonable dowery, portion, or donation, (*ex capite inofficiosa dotis vel donationis ad supplementum dotis.*)

This is also the reason that it has already been decided above, that when a grandson comes in competition with the son of the grandfather, to whom they succeed both, the grandson is only obliged to collate to the mass of the succession what he has received from his grandfather, and not what his father and mother have received from him, if he have renounced their succession.

N. 2. A person who has once renounced a succession, cannot afterward be admitted to it, even though he should offer to collate all that he has received, unless within the time prescribed by this body of law he demanded and obtained restitution to his right for a just cause; for example, if by his renunciation he had been wronged above the half, (*ultra dimidium*): but in this case, in estimating the wrong, regard shall be had to the condition in which the effects were found at the time he renounced them, (*lestis ex tempore renunciationis.*)

III.) It is requisite, in the third place, that the children have received in fact something of the effects belonging to their father and mother, to whose succession they are called.

Thus when children succeed to their defunct father, they are not obliged to collate and communicate what they received from their father, when they succeed to their mother, still less ought they to collate what they have received or acquired otherwise, and which belongs to the adventitious and camp peculiars.

§ 8.

IV.) It is requisite, in the fourth place, that the children have received, in the lifetime of their father and mother, what they are to collate and communicate.

So they are not obliged to join to the mass of the succession the legacies left to them by the testator.

§ 9.

V.) In fine, children are not obliged to collate and communicate any thing but what is still existent, and makes part of their effects at the time of the testator's death; so that it is sufficient if the collation and communication of the effects received be made in the condition in which they are at the testator's death, both with respect to their quality and quantity, (*in quali et quanto.*)

N. 1. Thence it follows, that children are not obliged to the communication or collation of effects,
1.) When the things which they have received in the lifetime of their father and mother have perished; or,
2.) When, having alienated them fairly, the value of the thing which they got for them no longer exists, and when besides they have no other effects but those which they get by inheritance.

§ 10.

Children are obliged to collate and communicate in general all that their father and mother have given them, or that the children have received on account of their father and mother, and in their lifetime: they ought in particular to collate to the common mass of succession,

I.) The profectitious peculiar, when they succeed to their father, because he has intrusted them only with the administration of it. See part I. title IX. art. IV. § 41. and following.

II.) Children who are out of the paternal power are also obliged to collate what they received from their father, to whose succession they are called, as well as the profits which they have made from those effects during their emancipation, and of which their father would have had the usufruct.

III.) Children ought to collate, in the third place, the presents which their father and mother had given them; unless the donation were given them by way of recompense, (*donatio remuneratoria*), and the father had declared so in writing, or that the children had not reaped, nor could reap any advantage from those presents.

IV.) Children, in the fourth place, are obliged to collation and communication of effects, when the father and mother have paid their debts, in what way soever contracted, whether for a civil cause or for a crime, (*ex causa civili vel ex delicto*.)

V.) They ought, in the fifth place, when their father and mother have maintained them, to collate and communicate what they have acquired by means of the effects of their father and mother, (*ex re parentum*); for example, when the latter have employed them in their trade, and the children by their care and industry have proved of some advantage to the father and mother.

The children shall not even in this case have a right to deduct from it their wages, far less can they claim a share of the gain; by which we prevent the lawsuits which might arise from the question, namely, Whether and how far the father's effects have been augmented by the care and industry of the children?

The case would be otherwise if the father or mother had promised their children wages, or had entered into partnership with them; in which case the children would not be obliged to collate and communicate the wages, nor the share of the profits which they may have gained in partnership with their father and mother.

Moreover, when they are obliged to collate the gain which they have procured to their father and mother, it is evident that the collation or communication is only made of what part of it exists at the time of their

their father's and mother's death, and by no means of what has been spent without the fault of the children. See above, § 9.

When fathers and mothers have advanced money to their children, for the trade of those latter, the children are not obliged to be accountable to the mass of the succession, but for the capital and interests promised and usual, according to the rate of the country. The case would be otherwise if they had carried on business only for the father's account; that is to say, if the money which they had in hand had only been a profectitious peculiar.

§ II.

VI.) A daughter, in the sixth place, is obliged to collate and communicate the portion which she has received from her father and mother, and to be accountable for it to her brothers and sisters, by allowing her share of the succession to be diminished to the extent of her portion.

N. 1. When daughters have received no portion from their father and mother, and have got it from their grandfathers or grandmothers, they are not obliged to collate and communicate, unless in a question concerning the succession of the grandfathers or grandmothers, from whom they received the portion; for, in this case, when they are called to their successions, the daughters and their children are obliged to collate and communicate the portion to the common mass of the succession. See above, § 5. n. 1.

N. 2. They are still less obliged to the collation and communication of the portion, when they have not received it, neither from their father and mother, nor from their grandfather or grandmother.

N. 3. Neither ought daughters to collate the portion which they have received from their father and mother, when they renounce their succession. The case

case would be otherwise if they had received the portion from their grandfather or grandmother, and the question were concerning their succession, or if the other children were wronged in their legitim.

N. 4. Daughters are bound to collate and communicate the portion, only such as it is at the time of their father's or grandfather's decease, (*tempore mortis patris vel avi.*) They are not then obliged to the collation or communication of the portion, when the things given in portion are perished, or have been alienated fairly by their husbands, or have been consumed in any other manner. See § 9. The case would be otherwise, if there were any fraud or fault on the part of the two spouses, or if the value of the portion were still extant, or if it had been used to acquire other things or subjects.

N. 5. Daughters ought not to collate their portion, when the father and mother, taking into consideration the portion which they have received from them, have left them in their will a share so much less, and have expressly declared, that it is from that motive that they allotted to them a less share than to the rest.

N. 6. When the portion shall only be promised to the daughters, and not delivered, its amount shall be included in the share which they have in the succession.

N. 7. In the collation or communication shall be included not only the portion, but also the increase or improvement of the portion, (*augmentum dotis.*)

N. 8. Daughters shall likewise be obliged to collate and communicate what they shall receive on their marriage, either in gold or silver, or in jewels and marriage-cloaths, of which they shall bring a particular account upon oath, if there be no other; and, as to their heirs, it shall be sufficient if they give oath that the account which they deliver contains all they

they know and believe to have been given to the daughters.

N. 9. They shall collate also what they shall have given to their bridegrooms, and which they got from their father and mother, as also what the latter shall furnish them for setting up their house, unless they were things of small value.

N. 10. The expense shall be collated which fathers and mothers have advanced, for obtaining a dispensation for a marriage in a forbidden degree, or for the proclamation of the bans, &c.

N. 11. But the charges which the father and mother shall pay for the marriage-entertainment shall not be collated, even though the married persons may have received from the guests nuptial presents, unless the father and mother have expressly ordered, that these charges may also be collated, or unless they have been reckoned in the contract of marriage as making part of the portion.

N. 12. The daughter shall collate also all the incomes and interest which she has reaped from the portion after the testator's death, as well,

N. 13. As what has been paid by the father and mother to the marriage-maker.

§ 12.

VII.) The husband must, in the seventh place, collate and communicate his donation on account of the nuptials, (*donationem propter nuptias.*) Moreover, all that has been ordered concerning the portion takes place likewise with respect to the donation on account of the nuptials.

§ 13.

VIII.) But, in the eighth place, a man is not obliged to collate the *camp-peculiar*. We have already observed elsewhere what is to be understood by this *peculiar*. See part I. book I. tit. IX. art. IV. § 62.

Herein

Herein particularly is included what fathers and mothers have given to their son for his equipage, even though he should not have made use of it, and though, on account of his sickness, &c. the equipage should not come to his hand.

The case would be otherwise, if the father and mother had expressly declared that the equipage was to be collated.

When fathers and mothers, after having once equipped their son, send him money, whether in the field or in his garrison, he shall be obliged to collate it, unless the father and mother have ordered expressly, and by writing, that the son ought not to collate that money.

§ 14.

IX.) A man is not obliged, in the ninth place, to collate and communicate the supposed camp-peculiar. We have seen, part I. book I. tit. IX. art. IV. § 66. what is understood in general by this peculiar. But in it is particularly comprehended what fathers and mothers have expended on the education of their children; for example, what they have paid to their sons preceptors, and to their daughters governesses.

N. 1. In this peculiar is likewise included the expenses for learning, and what relates thereto; for example, what is paid for the courses of the sciences which the sons have passed in colleges or universities, or for getting them taught their exercises.

Likewise, the books which the sons have used in colleges; but not those which the father has lent them out of his own library, and which are not books used in schools and academies.

N. 2. Nevertheless, as it would not be equitable that the children who have not yet got their education, should be deprived, by their father's and mother's death, of the advantage of studying in an university, at the common expense of the family, we have

have found it agreeable to equity to ordain, by these presents, that, for each of the sons who have not been at the university, and who want to continue their studies, two hundred rix-dollars be deducted yearly from the mass of the succession, for as many years as the other sons have been at the universities.

N. 3. When a testator has left, in former legacies, to his son, necessary expenses for his learning, without determining the time nor the sum, these expenses cannot be made to amount higher than the sum of three hundred rix-dollars a-year, nor exacted for more than three years.

So it is only on that footing that the son can be exempted from collation or communication of effects, with regard to the expenses of his learning.

N. 4. When it is necessary for defraying these expenses to borrow money, the payment of it shall be made solely out of the shares of the other heirs.

N. 5. Neither is it inquired whether the son have usefully employed his time and his money: the reason of which is, on one side, that those expenses which the son is not obliged to collate, have been determined on a very moderate footing, and that, on the other side, the inquiry concerning the employment of his time and money might occasion very expensive and tedious law-suits.

N. 6. Moreover, all those rules do not take place, when the testator declares expressly, and by writing, that the son ought to collate the expenses laid out for his learning.

In this case, however, that is understood only of the expenses at the universities, or illustrious colleges, (*gymnasis illustribus*), but not of those laid out at ordinary schools, even though he were sent, for that purpose, into another town than that of his father's and mother's residence; for that sort of charges make a part of the necessary expenses for educa-

tion, with which fathers and mothers are burdened even by nature.

N. 7. In the expenses of learning cannot be included the sums laid out on a son's travels, nor the disbursements of a father and mother, to obtain for their son the employment or dignity, for example, of a doctor, &c. or a canonicate; wherefore also the children cannot be excused from collating that kind of expenses, unless the father and mother have declared expressly, by writing, that they dispense with their so doing, it not being sufficient that they have marked them plainly in the article of expense in their journal.

N. 8. It must be particularly observed, that, when the expenses for learning amount so high, that the other children are wronged by it in their legitim, the latter have a right to require what is wanting in their legitim, without distinguishing whether their father and mother have dispensed from the collation of effects the expenses laid out for learning. They shall consequently have a right to avail themselves of what has been ordained concerning unreasonable donations.

§ 15.

X.) Children, in the tenth place, are not obliged to collate and communicate the adventitious peculiar, because they have it not from their father: but as, in his lifetime, he had the usufruct of it, it follows that if, at his death, there were still due to him a part of the fruits, or produce of that peculiar; for example, if the fruits were still existing, or hanging on the trees, they must be joined to the common mass of the succession.

N. 1. When the father has renounced the usufruct of that peculiar, or has left to his son the care of collecting its fruits, without requiring them from him, in these cases the son shall not be obliged to collate,

collate, neither the fruits received nor those which are extant, or hanging on the trees, (*neque fructus perceptos, neque extantes, neque pendentes.*)

N. 2. When children succeed to their mother, they collate neither the peculiar nor the fruits.

§ 16.

XI.) Children, in the eleventh place, are still far less obliged to collate the extraordinary peculiar, (*peculium extraordinarium*), and to be accountable for it to their brothers and sisters, because it does not come to them in any way from their father and mother's fortune.

§ 17.

XII.) In the twelfth place, neither are children obliged to collate and communicate the legacies which their father and mother have left them. The reason of which is, that they receive them not in quality of children, but of strangers.

§ 18.

XIII.) In fine, they are not obliged to communicate and collate what their father and mother have expended for bringing them out of slavery, or paid for their ransom, when they have been made prisoners by the enemy.

§ 19.

Children have a right, both before and after the division of the succession, to demand that a collation and communication of the effects be made: for the opinion which prevails that they renounce their rights, consenting to the division, has no foundation.

§ 20.

The collation and communication of effects may be made in three ways.

I.) It may be made really, (*realiter*), namely, when the thing which is to be collated and communicated

is joined in kind to the mass of the succession, and the heir is obliged to do so, without being able to excuse himself by offering to pay the value, or to take so much less of the effects of the succession.

This rule admits an exception in the cases following; namely, a) When the heir has taken some books out of his father's library, and has made remarks on them in several places; b) When the coheirs can make no use of the thing which is to be collated; for example, if the heir being a soldier, his father had given him arms, and afterwards had ordered that he should collate them. In both cases it shall be sufficient to collate and communicate the value.

II.) The collation and communication of effects may be performed, in the second place, by way of fiction, (*fiçte*); namely, when what is to be collated (*conferendum*) cannot be done in kind, or when it is not necessary to make the collation in kind; in these cases the heir is obliged to be accountable for so much (*tantundem*) to the mass of the succession, by allowing to be given him his share of the succession, in proportion to the right which the coheirs have in what he is to collate or communicate, he has also a right to compensate what he is to collate or communicate, with the claims which he has as heir, on what is due to the succession, and to assign the debt to his coheirs, as also to take upon himself alone a passive debt of the succession, or a debt due by it (*per exemptionem*), and to liberate his coheirs of it proportionally to what he ought to collate.

It is supposed, however, that, in this feigned collation, (*in hac ficta collatione*), what comes in place of it, is as clear as what the coheirs might get by a real collation and communication of the fortune, (*ex reali collatione*.)

III.) Collation of effects may be performed, in the third place, by way of surety, (*cautionaliter*); namely, when

when it is still uncertain if there be children who are bound to the collation or communication of effects, and it is not known how much is to be collated. For, as the division of the succession cannot be stopped thereby, he who is bound to the collation of effects must give security within the space of three months, reckoning from the time that the collation was required, by a surety or cautioner, and must promise that, when it shall be settled what he ought to collate, he should be accountable to his coheirs for what ought to fall to them of it, as well as for all damage, (*cum omni eo quod interest.*)

If he cannot give such security, or will not do it, the thing which ought to be collated shall be deposited in court, or else a trustee shall be appointed on the share that he may claim of the succession, who shall continue intrusted with it till the point concerning what he is to collate and communicate be settled.

When the heir who ought to give security shall happen to die without having given it, his heirs shall be obliged to supply it.

§ 21.

When the person who ought to collate shall deny having received any of his father's or mother's effects, his coheirs shall, at any rate, put it to a trial by referring it to his oath; and, when he shall own his receiving any thing, he shall be bound to declare upon oath the amount of what he has received.

The grandchildren are also obliged to give their oath on what they believe the father and mother have received of their grandfather or grandmother.

§ 22.

When the father and mother shall mark, in their journals or memorandum-book, what the children have received from them, it shall not thence follow that they designed to oblige their children to collate

collate those things, when they are such as are not usually included in the collation or communication of effects.

§ 23.

When one of the children will not comply with what is prescribed concerning the collation of effects, his coheirs may oblige him to it, and apply, for that purpose, to the judge, (*per implorationem judicis.*)

And if, without making collation of the effects which he has received, he demand his share of the succession, and raise the action called *petitio hereditatis*, he shall be cast in his demand, on the objection *non factæ collationis*.

N. 1. When an heir shall bring sureties or cautioners on account of the uncertainty of what he ought to collate, and when, after that point is settled, the amount shall be known of what he ought to join to the mass of the succession, his coheirs may oblige him to collate and communicate it, by applying for that purpose to the judge, (*implorando officium judicis*); and, in case he be not solvent, they may sue the sureties in an action *ex fidejussu*.

N. 2. When an heir shall be obliged to collate what he has received in favour of two coheirs, and shall satisfy the one without accounting to the other, this last shall have a right, when the heir shall demand his share of the succession, to get him cast in his demand, on the objection *non factæ collationis*.

N. 3. When the collation of effects shall be ordered on pain of a fine, and the heir will not comply with that ordinance, there is no doubt but the judge, in constraining him to make payment, may likewise exact the fine.

N. 4. When, after division of the succession, one of the heirs shall demand likewise the collation of effects, it shall not be necessary for him to raise the action
called

called *condictio indebiti*, but it shall be sufficient, if he beg for that purpose the judge's assistance, (*per implorationem officii judicis.*)

T I T L E X V I I .

Of wills null in themselves, and of the methods of invalidating a valid will.

(*De injusto, rupto, irrito, deleto, deserto, &c. testamento.*)

§ 1.

Wills which have any defect are either null from the beginning, or are invalidated afterward, even though they might be valid from the beginning.

§ 2.

A will is null from the beginning,

- 1.) When the testator has not a right to make a will; or,
- 2.) When he appoints or nominates no heir; or,
- 3.) When he nominates an heir who cannot be appointed according to the laws.
- 4.) The will is null in particular, when the testator does not appoint nor disinherit expressly, by name, his children, or his father and mother; and passes them over in silence in his will.

In fine, 5.) A will is also null, when the heir has forced the testator to make a will, or has induced him to it by fraud or by fear, (*dolo vel metu.*)

§ 3.

Moreover, it is not necessary that an heir have used open violence; but to be reckoned to have used violence, it is sufficient, for example, that, by harsh proceedings,

proceedings, or by menaces, which might intimidate him, or by depriving him of the care which sick persons, who cannot stir out of bed, cannot be without, he have obliged a wife, a sister, a mother-in-law, or a stranger, to make a will, which, without that usage, they would not have made.

It shall also be reckoned as a wicked and unlawful inducement, when any one, by his importunities, and by his tears and continual lamentations, shall have engaged a testator to make him heir.

N. 1. The will is equally null, whether the heir have employed the violence before the making of the will, or at the time that it was made.

N. 2. But it must be proved in particular, that the heir used violence to oblige the testator to make a will.

If then the violence had been used in other circumstances, and for other reasons, the will would not be invalid on account of violence.

N. 3. The caresses bestowed on a testator, with a view of one's insinuating himself into his good graces, and inducing him to make a will in one's behalf, shall not be reckoned a fraudulent inducement.

N. 4. The person who pretends that a will is null, because violence and threatenings have been used to the testator, or because he has been fraudulently induced to make his will, is obliged to prove what he advances; but, to make this proof, it shall be sufficient, if the wife, the mother-in-law, or even another testator, have attested judicially, or before a notary and two witnesses, or by a note written and signed by their own hand, that they have been induced or forced to make their will.

N. 5. The heirs intestate are also at liberty to put this to the oath of the heir appointed.

§ 4.

When the heir cannot be convicted immediately of having used violence and threatening, or of having fraudulently and wickedly induced the testator to make his will, and when the will has no visible defect, he shall be put in possession of the succession in virtue of the final law, *de edicto divi Hadriani tollendo*.

§ 5.

There arises no obligation from a will which is declared null, even though the testator should have declared on oath that he did not want to alter it, or though he had added the codicillary clause: wherefore the substitutions and legacies which it contains are invalid, even though they were made in favour of the sovereign, or of a pious community. But indeed the substitutes and legataries have a right, when the testator has been forced or fraudulently induced to make a will, to sue him who used violence or fraud, to obtain of him their damages and interests: he may besides be criminally prosecuted.

§ 6.

When a will shall be annulled, the heirs intestate shall succeed, and not the exchequer; or if there have been a will made before, the heir therein appointed shall be called to the succession.

§ 7.

A will valid from the beginning, and drawn up with all the solemnities or formalities, likewise may, nevertheless, be invalidated, for several causes, namely, 1.) When it is made void or disappointed, (*ruptum*); see art. I. 2.) When it is ineffectual, and what is called in law *irritum*, that is to say, when the testator is not in a condition to make a will; see art. II. 3.) When the will is deserted, (*desertum*), that is to say, when the heir will not, or cannot accept the succession; see

art. III. 4.) When the heir is reckoned as not having been nominated heir, (*pro non scripto*); see art. IV. 5.) When the heirs are deprived of the succession, as being unworthy of it; see art. V. 6.) When a valid will is annulled and made void; see art. VI.

A R T. I.

Of the cases in which a will is made void, vacated, or disappointed.

§ 8.

I.) A Will is made void, vacated, or disappointed, 1.) By the birth of an heir of a man's own, (*sui heredis agnatione*); that is to say, when there is born to the testator after he has made his will a child, whom he should have appointed his heir as his own nearest relation.

It is requisite for this purpose that the testator's own heir be born, a) At the full time; b) Alive; having, c) A human shape; and, d) That it be in life at the time of the testator's decease.

By the birth of such an heir (*per agnationem heredis*) the whole will is annulled, even though the testator may have known that his wife was with child; neither shall this will be valid as a trust-deed, even though the codicillary clause may have been added to it, because we have ordained, that the codicillary clause be void and of no effect: still less shall any have a right to acquire the legacies that shall be made in this will.

It cannot be reckoned as the birth of a person's own heir, (*pro agnatione sui heredis*), when the testator appoints his son heir, and when there are children born to this last after the will is made, even though the son should happen to die before the testator; for the son transmits all his rights to his children, and they,
in

in virtue of the title of transmission, (*jure transmissionis*), enter upon their father's right.

§ 9.

II.) A will is made void, in the second place, by what is called in law *quasi agnatio sui heredis*; which takes place when the person who is born before or after the will, not being the nearest relation, becomes so afterward, and breaks off the will in which he is not nominated and appointed.

A will is also made void, when a father, after having made his will, legitimates his illegitimate son by subsequent marriage, or when he adopts a stranger, (*arrogat extraneum*).

Likewise, when one of the ascendants, after having made a will, adopts a descendant; for in these cases the children are in effect passed over or omitted.

§ 10.

III.) A valid will is made void, in the third place, when the testator changes his mind, and makes a second will; unless he declare expressly in this last, that the first is also to be valid, in so far as it shall not be altered by the second.

N. 1. The first will is annulled by the second, even though the testator may have added the clause, never to revoke it, (*clausulam de non revocando*), and though he may have done it upon oath: neither can the first will subsist as a trust-deed, or feoffment in trust.

N. 2. But it is requisite that the second will be executed with the formalities or solemnities prescribed for judicial wills, if it be made judicially, or for privileged wills if it be a privileged will.

N. 3. A second will formally made makes void and annuls the first will, a) Though the heir appointed in the second, will not or cannot accept the succession; or, b) Though the heir be appointed and nominated in it only for a particular and certain thing, (*in re certa*.)

N. 4. The first will, after being made void, cannot afterward become valid, even though the testator should declare afterward that the first will was to be valid, and not the second; for such a declaration ought to be made in a new solemn will.

N. 5. It has already been declared above how far a mutual will might be revoked by one of the parties. See title IX.

§ 11.

IV.) A will, in the fourth place, is made void when the testator cancels and tears it purposely, or when he crosses, scratches, or erases the will, in whole, or for the greatest part, when he breaks off the seal of it, when he covers it with ink, &c. The case would be otherwise if those things were done by chance, or if the testator had done them in a furious fit.

It is always presumed that the testator designed to annul his will by such actions, when the will is found in the testator's hand; but when it is found with a stranger, the presumption is, that those things have happened by accident.

§ 12.

V.) A will, in the fifth place, is never made void by a simple revocation, but it is requisite for that purpose that the testator revoke it judicially, or that he make another will.

It is reckoned as a revocation when a testator who causes his will to be brought out of court does not afterward present it anew in court, and does not at the same time observe all the solemnities prescribed above. It would also be reckoned void, even though the testator should have kept it among his papers without unsealing it.

ART. II.

Of the manner in which a will becomes what is called in law irritum, of no effect.

§ 13.

A Valid will is invalidated, or made void, when it becomes what is called in law *irritum*; which happens, when the testator, after making his will, becomes incapable of making a will; for example, when he is proscribed; see above, title XV. § 9.; or when he is adopted by another, &c. but not when he is freed from the paternal power by emancipation.

When those kinds of defects or faults (*vitia*) happen to cease before the testator's death, the will nevertheless is not thereby rendered valid: the reason of which is, that what has once been rendered invalid cannot again become valid; but the testator is obliged to make a new will.

ART. III.

Of the manner in which a will is invalidated for want of the acceptance of the inheritance by the heir.

§ 14.

A Will is invalidated when it becomes what is called in law *desertum*, abandoned; that is to say, when the heir will not, or cannot accept of the succession: such a will cannot subsist, even though the testator should have confirmed it by his oath, or though the sovereign, or a pious community, were appointed heirs in it: but in this case it is only the nomination of heir that is invalid, and both the legacies

cies and other settlements shall be effectual; wherefore it has been decreed, that with this view, and for this purpose, (*ad eum effectum*), the heir shall be held as heir, and the succession reckoned accepted, (*pro adita*); for it would not be equitable that the legataries, by the caprice of the heir, or at least by his deed, (*eius facto*), should be deprived of the favours which the testator designed to bestow upon them.

A R T. IV.

Of the cases in which an heir is reckoned not to have been nominated heir, (pro non scripto.)

§ 15.

A Will is invalidated when the heir appointed, being reckoned as if he had not been nominated heir, (*pro non scripto*), has not a right consequently to succeed; which happens,

- 1.) When he is incapable of being heir.
- 2.) When the testator has added to the nomination an impossible or scandalous condition.
- 3.) When the condition of the nomination does not exist.

A R T. V.

Of the cases in which the heir is deprived of the succession, as being unworthy of it.

§ 16.

IT happens likewise that a will is invalidated as a punishment (*in pœnam*) to the heir, namely, when he is deprived of the succession, as being unworthy of it: in this case the substitute, or the heirs intestate, shall

shall be called to the succession, reserving however the legacies, (*salvis legatis*); which shall take place,

1.) When the heir shall purposely kill the testator, or the children, or the father and mother of the testator, either before or after the will.

2.) Or when he has occasioned it by his fault.

3.) Or when he shall not avenge the testator's violent death; that is to say, when he shall not discover the fact to the judge, with the circumstances and tokens which shall appear to him useful for discovering the perpetrator of the murder.

4.) Or when he shall, after the will, have caused the testator to be accused of any great crime, or shall have informed, or caused information to be made against him to the judge as guilty of such a crime, or when, on such an occasion, he shall perform the office of advocate against him without being obliged to it by his employment; or shall offer himself voluntarily to depose against him.

5.) Or when he shall call in question his condition, and shall, for example, reproach him with being a slave; or shall object against him as infamous, at the time the testator sued for a dignity; or shall abuse him by deeds, or by injurious words.

6.) When a man shall marry a woman whom the laws do not allow him to marry, he cannot become her heir; for example, when a man shall marry the woman with whom he has committed adultery, even though we may have given him a dispensation for that purpose: which shall likewise be observed with respect to incests, which shall be committed within a degree prohibited by the divine laws.

7.) When the testator shall indeed appoint an heir capable of succeeding, but shall ordain him to restore the succession to a man who is unworthy of it, what is prescribed in the preceding case shall be observed.

8.) When the heir shall plunder or carry off the succession,

succession, he shall be deprived of it in proportion to what he has taken.

9.) A person who shall marry his pupil, without having first given up his accounts, cannot become her heir.

10.) But such shall not be reckoned unworthy of succeeding who make among themselves agreements concerning the succession of a person who is still alive.

11.) When a man shall be guilty of self-murder, the exchequer shall not succeed to him, supposing even that the remorse of his own conscience for a crime of which he was guilty had induced him to take away his own life; but the succession shall fall to the heir substituted, or to the heirs intestate, or at law, unless the crime he had committed inferred confiscation of effects.

12.) When a testator appoints two heirs, of which one is unworthy of the succession, the portion of this last shall not accrue to the coheir, but falls to the heirs intestate, or to the exchequer, if the unworthy heir's effects have been confiscated.

A R T. VI.

Of the cases in which a valid will is annulled and made void.

§ 17.

A Valid will is also annulled and made void when a father and mother have disinherited their children, or the children their father and mother, without alleging any cause of disinheritance, or without really having any just cause for disinheriting them: in this case the will is annulled on a complaint of unreasonableness, (*per querelam inofficiosi testamenti*), of which we have treated in tit. VI.

T I T L E

TITLE XVIII.

Of the action by which a succession may be demanded and obtained.

(De petitione hereditatis.)

§ 1.

WHEN a succession falls to a man, either intestate by virtue of a will, of an agreement, or of the statutes, and another is in possession of it, and disputes it with the heir, this last has a right to raise against the other the action called *petitio hereditatis*.

§ 2.

Petitio hereditatis is then the action by which the true heir demands that the person who possesses and retains the succession, that is to say, the whole rights of the defunct, (*universitatem omnium bonorum*), be obliged to deliver them to him with all their dependencies, (*cum omni causa*.)

§ 3.

This action is either direct or in trust; we shall treat of the first in this title, the other having been explained in title VIII.

This action, in the second place, is either direct or advantageous; this last takes place against the person who possesses the succession on a particular or singular title, (*titulo singulari*); it takes place, for example, against a man who possesses a succession on a title of purchase, (*contra emptorem hereditatis*.)

§ 4.

All heirs have a right to raise this action, whether they be heirs intestate, or called to the succession by

a will, by an agreement, or by the statutes; the heirs intestate, even who, after having acquiesced in the will, have been restored to their right against the entry of the heir, may use this action.

§ 5.

The heir who wants to raise this action must prove, 1.) That he is heir, and join for that purpose the will to his demand: in this proof is also included that of the testator's death. 2.) When the heir succeeds intestate, he must prove that he is the nearest relation, and must join for that purpose a legal genealogy, unless the proximity be apparent. 3.) The heir must also prove that the defender is in possession of the succession.

§ 6.

This action takes place against all such as hold the succession, *N. B. in quality of heirs*, or of possessors.

A man possesses a succession in quality of heir, when he pretends to be heir intestate, or at law, or by virtue of a will, of an agreement, or of the statutes, whether fairly or unfairly, (*bona aut mala fide.*)

§ 7.

A man possesses a succession in quality of possessor, when he can produce no title for his possession, or when he alleges one which is invalid according to the laws; for example, if the possessor say that he was appointed heir by a furious person.

§ 8.

They are likewise reckoned heirs or possessors who have fraudulently parted with the succession; nevertheless they shall be free, when the person who is in possession will take upon him the cause, or law-suit raised against them, as also when the subject or rights in dispute shall be offered to the heir, with damages and interests, or shall really be delivered to him.

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This action likewise takes place against the heirs of such as have possessed the succession in quality of heirs or possessors.

But the direct action (*petitio hereditatis directa*) does not take place against such as possess the succession from a singular title; they must be sued in an advantageous action, (*utili actione*.) See above, § 3.

§ 9.

Thence it follows, that the action *petitio hereditatis* never takes place against a person who possesses a subject or succession on a singular title, (*titulo singulari*): thus when a person who possesses a succession in quality of heir, or of possessor, shall sell to a third party some parts of the succession, or shall constitute a dowery upon it in her favour, &c. the heir cannot raise against him the action called *petitio hereditatis*, but he shall be obliged to get decided, first, the law-suit concerning the succession itself, and afterward he may redemand from the third party the subjects belonging to the succession.

§ 10.

That the heir may know on what title another possesses the subjects belonging to the succession, and whether he hold them in quality of heir, or of possessor, or on a singular title, he is at liberty to oblige the possessor to declare his title, though usually nobody be obliged to make known the foundation of his possession.

To avoid this preparatory action, (*actionem preparatoriam*), the heir has a right to combine the two actions, namely, the action called *petitio hereditatis*, and the claim of right: he is also entitled to combine the action called *petitio hereditatis*, with the interdict *quod legatorum*, &c. when a person has taken any thing out of the succession, and is ignorant whether it be done in quality of heir, or of legatary.

§ 11.

It is not necessary that the person who is sued in quality of heir, or of possessor, be in fact in possession of the succession when the action is raised, but it is sufficient if he have obtained the succession before sentence.

§ 12.

The action called *petitio hereditatis* takes place against the heirs of those who possess the succession in quality of heirs, or of possessors, even though those heirs acted fairly, that is to say, even though they were ignorant that the defunct from whom they hold the succession possessed it without a just title, (*absque justo titulo.*)

§ 13.

This action also takes place against particular or singular successors, (*successores singulares*), when, for example, the person who possessed the succession in quality of heir, or of possessor, sold or yielded it to another; nevertheless in this case the laws allow only properly the advantageous action, (*petitionem hereditatis utilem.*) See above, § 3.

§ 14.

By this action the demandant requires the judge to declare him the true heir, and that the person who possesses the succession in quality of heir, or of possessor, be obliged to restore it to him with all his damages and interests, (*cum omni causa.*) See below, § 24.

§ 15.

I.) In the inheritance or succession is included,
1.) The generality of the effects and rights of the defunct, and consequently all that was at his death among his effects, as well subjects moveable and immoveable, as corporeal and incorporeal: likewise things deposited, lent, &c. (*res deposita, commodata.*)

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The reason of which is, that the defunct having taken them upon himself, was bound to be accountable for them. The servitudes included in the succession cannot be claimed by the action called *petitio hereditatis*, but it is sufficient if the subject of the succession be claimed and restored, which ought to be delivered, with the rights belonging to it; so that if, after the restitution is made, the proprietor of the servient subject deny that he is bound in the servitude, the heir may claim his right of servitude by a confessory action.

In the mass of the effects of the succession, (*in corpore hereditatis*), are included not only the real rights, but also all the personal obligations, (*præstationes personales*), in virtue of which the defunct was entitled to raise personal actions, (*actiones personales*;) and, in one word, all the rights that he had.

II.) In the succession is further included, all that, after the testator's death, happens to make a part of the inheritance; for example, what accrues to a subject of the succession by means of alluvion, the money arising from the sale of subjects belonging to the succession, or things purchased with the money of the succession, when the possessor, who has used them for that purpose, will not, or cannot reimburse it in cash.

And when the possessor shall acquire any actions on account of the succession, he shall be obliged to give them up to the heir.

III.) The possessor of the succession is besides obliged, a) To restore all the incomes and fruits which he has received: he is also, b) In certain cases answerable for his fault; and, c) Sometimes he is answerable for casual misfortunes; there are likewise, d) Cases, in which he has a right to deduct the expenses laid out by him.

§ 16.

As in all these cases a distinction must be made between a fair possessor and one who possesses unfairly, we are now to show what the one and the other are obliged to restore.

We must previously remember what has been said in the title of claim of right, concerning the fair (*bona fide*) possessor, and conclude from it here, that it is he who believes himself entitled to keep the succession, and that it belongs to him of right; such as a person who has bought a succession fairly, and on a just title, (*bona fide et justo titulo*), from a man who possessed it in quality of heir, or of possessor; likewise, a person who believes honestly that he is the nearest heir.

He is also reckoned a fair possessor, though he mistake the law; for example, when he believes he was appointed heir by a valid will, which nevertheless is invalid.

He is called an unfair (*mala fide*) possessor, who, knowing well that he has no right to the possession, nevertheless appropriates it to himself; or who takes possession of it, though he be not ignorant that the person who has appointed him heir had not a right to do so.

He is also reckoned an unfair possessor, a) Who has fraudulently parted with the succession: b) Likewise, a person who was indeed a fair possessor in the beginning, but who was found unfair by the litigation, (*per litis contestationem*); see part II. book II. title IV. art. I. § 26.: c) Likewise, a person who also at first thought himself intitled to the possession, but who was afterward convinced of the contrary, who acts unfairly from the moment that he knew how the matter stood.

Unfair possessors are also distinguished into ordinary possessors,

possessors, and into such as have taken up the possession by any act of violence. See below, § 20.

§ 17.

A fair possessor is obliged, in the first place, to restore either the whole succession or a part, with the accessions which, after the testator's death, have accrued to the succession, for example, in the way of alluvion. See § 15.

Nevertheless, he is obliged to restore only what is existent at the time that the demand of it is made, and in so far as he is become richer by the possession of the succession.

A fair possessor is reckoned as become richer, when his effects have been augmented thereby; for example, when having sold subjects belonging to the succession, he has laid out the money received for them on interest, or when he has used the money for buying household furniture, &c.; likewise, when he made use of it for maintaining his family, which otherwise he would have been obliged to support out of his own money.

The time at which the fair possessor has become richer, is not reckoned from his entry on the inheritance, but from the commencement of the law-suit. If he made a present to any one of a part of the succession before the litigation, he shall not be obliged to restore the things which he may have given away, but the heir must claim them from the person who is in possession of them.

But an unfair possessor is obliged to restore the succession, in the same condition it was when it fell to him, without distinguishing whether all the subjects of the succession be still existent or not, or whether he be enriched or not. When the things cannot be restored in kind, the heir may demand their value, and prove it by his own oath *in litem*.

§ 18.

A fair possessor is not obliged, in the second place, to restore the fruits received, and honestly consumed, unless, 1.) They be still really existent at the time of the litigation; for example, the fruits on the trees, and all that is put up in barns, &c. ; or, 2.) Unless he be enriched; for example, if he had supported his family by it, to the support of which he would otherwise have been obliged to employ his own money, or if he had sold the fruits, and laid out the product on interest. See part II. book II. title IV. art. I. § 25.

The unfair possessor is obliged to restore not only the fruits received, but also those which he might have received.

Note, as to the interest of capital sums of the succession, the fair possessor is likewise obliged to restore them, when they are not fallen due at the time that the law-suit concerning the succession began, (*tempore litis motæ*), or when he is enriched thereby.

When the fair possessor has sold a subject belonging to the succession, and has laid out the price for his own advantage, he is obliged to restore only the price, and not the interest.

The unfair possessor is obliged to restore, not only the interests of the capitals which he has drawn, but even those which he might have drawn, as well as those of the sum which he has received for subjects of the succession sold by him.

§ 19.

The fair possessor, in the third place, is never answerable for his fault; the reason of which is, that he thinks it is his own fortune which he neglects, which is allowable for him to do according to the laws.

But the unfair possessor is answerable for the slightest

est fault, (*culpam levissimam præstat*), when the loss which has happened in the subjects which belonged to the succession, was occasioned by his neglect, but which is understood that he is obliged to take the same care of them, as the most diligent œconomist takes of what belongs to himself.

§ 20.

A fair possessor, in the fourth place, is not answerable for casual misfortunes; that is to say, he is not obliged to pay the damages which have happened by accident.

Neither is he obliged to do so, when the accident happens after the demand of the succession was made, and the cause litigated; the reason of which is, that though, after the litigation, the possessor be considered as being unfair, it nevertheless is still doubtful, whether he be in the wrong, and it is only by the sentence which is to pass that it will appear whether his claims be ill founded; so that the loss which happens to the succession, while he is defending his own presumptive rights, cannot be imputed to him.

As to the unfair possessor, a distinction must be made, whether he appropriated to himself the succession by violence, or if he have obtained it without using violence; for example, if he had bought it from the person who was in possession of it, knowing well that the seller had no right to it.

In the first case, the unfair possessor must be answerable for casual misfortunes, even though they should happen before the litigation; but, in the second case, the unfair possessor is not answerable for casual misfortunes; that is to say, obliged to pay the value of the things perished by accident, till after the cause is litigated with him.

§ 21.

In the fifth place, with respect to the cases in which

possessors have a right to exact or deduct the expenses laid out by them, it is sufficient to refer to the title of claim of right where that subject has been treated. See above, part II. book II. title IV. art. I. § 26.

§ 22.

One may also see there, in § 28. the obligations of a possessor's heirs, both fair and unfair, which we have there explained clearly and distinctly.

§ 23.

Though a person be heir only for a part of the succession, as happens when there are coheirs, he has nevertheless a right to raise the action above mentioned against those who possess the whole succession, or only a part in quality of heirs or of possessors; when there are several heirs, and when there is one of them who wants to take advantage of the space for deliberating, the rest cannot be hindered thereby from demanding, by means of this action, the share which falls to them.

When the defunct leaves, on the one side, a son, and, on the other, a widow with child, the son cannot demand more than the fourth of the succession, because she may be delivered of three children,

§ 24.

When a succession is claimed not as direct heir, (*ut heres directus*), but by virtue of a substitution in trust, one has the action called *petitio hereditatis fideicommissaria*, which is agreeable in every thing to the action called *petitio hereditatis directa*. See above, part II. book VII. title VIII. § 26.

§ 25.

When differences arise between coheirs concern-
ing

ing the division of the succession, or of the subjects belonging to it, they may get them settled by means of the action *familie erciscundæ*. See the following title.

§ 26.

From the moment that the action *petitio hereditatis* is raised against a possessor, he has no longer a right to alienate any thing whatever of the succession, unless the alienation be very necessary or advantageous, and the judge, after taking cognisance of it, have approved it as such by a decree, or unless the possessor have given sufficient security on that head.

§ 27.

When a possessor shall render himself suspected of dissipation, or squandering, or shall have but little or no fortune, the heir may oblige him to give sufficient security, by sureties or pledges, that he will preserve the succession, and will not in any wise waste or destroy it. If he do not bring this security within the space of six weeks, the judge shall settle a curator or trustee for the succession; and our will is, that an appeal from such a sentence do not hinder his settlement, nor have any other effect but that which is called devolutive, (*quoad effectum devolutivum*.)

§ 28.

Moreover, creditors, and, in particular, legataries, shall not be obliged to wait till the principal cause be decided; but they shall have a right to raise their actions against the possessor, who shall be obliged to pay what the judge shall declare to be due to them; but the creditors and legataries shall give security, that, in case afterward the heir deny the debt or the legacy, or if he dispute them, they shall restore with interest all that they shall receive. That the creditors and legataries may act with more safety, and avoid

giving security, it shall be allowable for them to sue, at the same time, the heir, in quality of a partner or sharer, (*ut consortem litis*), and summon him jointly with the possessor.

§ 29.

When a fair possessor has alienated the succession, or any one of the subjects making a part of it, and when the price which he has drawn for it happening to be lost, he is not consequently enriched, it is demanded, whether the heir can redemand the subjects alienated from the purchaser, when the latter has raised an action of warranty against the seller; or if the purchaser may demand that the action raised against him by the heir may be suspended, till the principal cause between him and the seller be decided. We think it equitable to give place to the claim of right, and, without waiting the decision of the principal cause, to oblige the purchaser to deliver the subject, or to deposit it.

The case would be otherwise, if the purchaser had a right to take his recourse against the possessor, in quality of his author or guaranty; for, in this case, the purchaser could not be obliged to restore the subject, because the seller would be bound to indemnify the purchaser; to which he is not bound, while the principal cause is not decided, (*pendente lite in causa principali.*) Whence it follows, that the decision of the principal law-suit between the purchaser and the fair possessor or seller must be expected; and if the purchaser answer immediately the heir's demand, and defend the right of his author or guaranty, the principal cause must also first of all be decided.

§ 30.

And, as it might happen that some debtors of the succession might come to fail during the continuance of the law-suit, provision has been made for that case,

case, by allowing the possessor, as well as the heir, to sue those debtors; nevertheless, the latter, after being decreed to pay, shall not be obliged to do so to either; but they shall deposite in court both the capital and interest due by them to the succession.

When the possessor and the heir shall both sue the debtor, or the latter shall object the exception *plurium interessentium*, the possessor and the heir must appoint one common commissioner or attorney. If they do not so, one shall be settled for them by authority, who shall prosecute the debtor in their name, shall recover the debt, and shall deposite it till the entire decision of the principal cause.

In case both should demand the money to be delivered to them, and should both offer to give undoubted security on this head, the judge shall prefer either the person who shall be in condition to give the best security, or him to whom the money can be intrusted with most safety, which is left to the prudence of the judge.

§ 31.

When the demandant, after having raised the action *petitio hereditatis*, shall have made no mention of the fruits, nor required them to be restored, the judge cannot, of his own authority, give any decree on that head.

§ 32.

The action *petitio hereditatis* is prescribed after thirty years, even though it should be raised by the children; for we entirely abolish the distinction of some lawyers, who have pretended that children have thirty years to sue as a person's own heirs, thirty other years to sue as agnats, and thirty years more to raise an action as cognats.

T I T L E XIX.

Of the action of an heir against his coheir.

(De judicio familiæ erciscundæ.)

§ 1.

WHen there are several heirs who cannot agree concerning the division of the succession, or of some of the things or rights making a part of it, they may demand a division of it to be made among them, and the action which the laws allow for that purpose is called *actio familiæ erciscundæ*.

§ 2.

The action *familiæ erciscundæ* is either direct or advantageous; this last is allowed to such as are not direct heirs, such as heirs in trust, and those who are heirs by statutes and by covenants, (*heredes statutarii et conventionales*.)

§ 3.

The action *familiæ erciscundæ* is mixed; for succession including rights, both real and personal, it follows that this action is real with respect to real rights, and personal with respect to personal engagements; and that, by virtue of a supposed contract, (*ex quasi contractu*); because the coheirs, by entering upon the inheritance, engage themselves, so to speak, to fulfil the defunct's will, who has divided the succession among them.

§ 4.

There are none but heirs who can raise this action against each other, and therefore the person who wants to raise it must prove his title of coheir, unless
he

he be in possession of the hereditary right, (*juris hereditarii*.)

N. 1. When one of the heirs happens to die, his heirs, whether they be lawful heirs, or called to the succession by a will, or by the statutes, (*heredes legitimi, testamentarii, vel statutarii*), have a right to raise this action: likewise, pupils adopted (*impuberes arrogati*) may demand, by virtue of this action, the share which falls to them.

N. 2. An heir has also a right to demand a division, contrary to the inclination of his coheirs, even though they were minors, and were in possession of the subject to be divided.

But when the demandant himself is a minor, he cannot demand a division without the consent of his curator, and without obtaining from the judge a decree allowing the alienation (*decretum de alienando*) of the subject to be divided.

When the division is made in the absence of one of the coheirs, that shall infer no prejudice to him.

§ 5.

The object of this action is not the hereditary right itself, (with respect to which it is not supposed here that there has been any dispute between the coheirs), but the common subjects of the succession; consequently not only subjects, in which the defunct had a real right, are included, but likewise all his other effects, and personal engagements, (*præstationes personales*); that is to say, all the rights which were due to the defunct, either by contract, or by forfeiture, or by any other means of contracting an engagement, (*ex contractu, delicto, et variis causarum figuris*.)

Herein is also included whatever, after the defunct's death, was acquired to the succession by virtue of an hereditary right, (*ex causa hereditatis*), as well as
the

the accretions which have happened to it since that decease.

§ 6.

But, in this action are not included the subjects which are common by virtue of a singular right; for example, by virtue of the right of property, nor obligations or bonds, which by law are divided among heirs. If they be not agreed concerning the bonds, the judge shall decide which of the heirs is to keep them, and shall determine what he is to pay to the rest, in proportion to the share which they have in them, or else the judge shall ordain, if the case so happen, the bond to be deposited, or that it be delivered by authority to a common commissioner, or attorney, to recover the debt in due time. But all this does not constitute properly a division of the effects.

§ 7.

This action cannot be raised, when the question is concerning things hurtful, pernicious, or infamous; &c.; for example, concerning prohibited books, poisons, &c. which ought to be destroyed immediately.

§ 8.

When the defunct has left among the effects of succession things which he has robbed, or got by any other crime, neither can a division of them be demanded, because they ought to be restored immediately, and because any person might have a right to prosecute for restitution of them, in the same way as he is entitled to demand that the subjects mentioned in the preceding section should be destroyed.

§ 9.

When there are documents and vouchers among the papers of the succession, and which make a part of it, they shall be delivered into the hands of those to whom

whom the things which they concern have been given in the division.

When the documents cannot be divided, the person who has the greatest share in the succession shall remain possessed of the originals; if they have equal shares, chance alone shall decide with which of the heirs they are to continue, without any regard had to the age, or the sex, or the station of the heirs.

But, indeed, the person who shall keep the originals shall be obliged to give to the others, on their common charges, collated copies of all the documents in his hands.

§ 10.

When an heir raises this action *familie eriscunde*, to obtain a division of a subject belonging to the succession, against a person whom he believes to be his coheir, he does not thereby do any prejudice to himself, in case the person whom he sues be not his coheir; and if he learn afterward that this pretended coheir has no share in the succession, he shall have a right to prosecute him, by virtue of the action *petitio hereditatis*, to get restored to him the share which he shall have acquired in quality of coheir.

When any person shall be declared heir by a sentence, and when the division of the effects of the succession shall be made in consequence by the judge, his coheirs shall not afterward be heard against the division which shall be made; even though this last should pretend that the judge had been guilty of an injustice in recognising the first for heir, or though he should maintain that he was wronged in an enormous manner by the division.

The case would be otherwise, if the division were not made judicially, and if the coheir had falsely passed himself for such: for, in this case, each of the other heirs would have a right to demand his share from

the false coheir, by virtue of the action *condictio indebiti*.

In this case the division which may have been made may also be annulled, on account of enormous wrong, but not if the wrong be of small importance. Nevertheless, it shall not be annulled, 1.) When both parties were not ignorant of the inequality; 2.) Or have transacted with respect to the wrong; 3.) Or if chance have decided the portions of the persons concerned; or, 4.) If the inequality took place only after the division was made.

§ 11.

We have already decreed above what the judge is to observe by his office in such a division. See the title concerning the action *communi dividundo*.

§ 12.

When the succession is once divided, and there shall still remain some things common among the heirs, the division of them cannot be demanded by virtue of the action *familiæ erciscundæ*, but the action *communi dividundo* must be raised, which takes place for things common to several persons.

§ 13.

After the division of the succession, and of all the things which make part of it, the coheirs ought mutually to warrant to each other their shares; that is to say, stop eviction, (*evictionem præstant*), suppose even the division had been made by the testator.

§ 14.

When an heir has possessed for thirty years a thing belonging to the succession, without its being divided, the coheir shall have no longer a right to raise an action against him on account of that thing, nor to demand it to be divided. The case would be otherwise if the question were about a common subject which one had possessed for thirty years.

BOOK VIII.

TITLE I.

Subject of the eighth book.

§ 1.

After having treated in the preceding book of wills, we must proceed to the subject of legacies, which can be made only in a will.

§ 2.

In title II. shall be shown in general what legacies are, and how they may be left.

§ 3.

We shall treat in title III. of annual legacies, (*de annuis legatis*), and of their effect.

§ 4.

In title IV. shall be shown what is to be included in legacies of personal servitudes.

§ 5.

And in title V. what is to be understood by legacies of real servitudes.

§ 6.

In title VI. shall be shown that a husband may leave a preferable legacy to his wife of the portion which he has received from her, (*de dote prælegata*.)

§ 7.

In title VII. we shall treat of legacies made to a debtor of what he may be owing, (*de liberatione legata*.)

§ 8.

In title VIII. shall be treated of the legacy of choice, (*de optione legata*), and of the effect of that legacy.

§ 9.

In title IX. of the legacy of a land-estate or country-fortune, which is furnished and provided with necessary things for the management of a farm, (*de fundo instructo, &c. legato*), or of its inventory, and what is included in it.

§ 10.

In title X. of legacies consisting in gold, silver, money, ornaments, and cloaths, and of what they include.

§ 11.

In title XI. of an indefinite legacy of furniture, and of its extent, (*de supellectile legata*.)

§ 12.

In title XII. of a legacy of household provision, and of what it includes, (*de penu legato*.)

§ 13.

In title XIII. of legacies consisting in corn, wine, or oil, and of what is understood by these legacies.

§ 14.

In title XIV. of a legacy of maintenance or aliment, (*alimenta*), or only of a legacy of board, (*cibaria*), and of what is comprehended in it.

§ 15.

In title XV. of the legacy of a peculiar, which a father leaves to his children, and of what must be understood thereby.

§ 16.

Of the conditions, proofs, causes, and burdens annexed to legacies, (*de conditionibus, demonstrationibus, causis, et modis legatorum*.)

§ 17.

§ 17.

In title XVII. of the time at which, and after which a legacy is due to the legatary, (*quando dies legati cedat.*)

§ 18.

In title XVIII. of the security which the heir is obliged to give to the legatary, when the legacy is to be paid after a certain time, (*ut legatorum nomine caveatur.*)

§ 19.

In fine, in title XIX. shall be shown how legacies are null, or may be annulled or revoked, which happens in several ways, namely, 1.) When the testator takes from the legatary the legacy which he had left him, and revokes it, art. I. 2.) When the legacy itself cannot subsist, art. II. 3.) When the testator's settlements are doubtful, art. III. 4.) When the legacy is null in law, (*legatum ipso jure nullum*), art. IV. 5.) When a legacy is reckoned as not executed, (*pro non scripto*), art. V. 6.) When the legatary is deprived of the legacy, because he rendered himself unworthy of it, art. VI. 7.) When the testator has made a mistake in the person of the legatary, or in the thing left in legacy, art. VII.

T I T L E II.

Of legacies.

(*De legatis.*)

§ 1.

A Legacy is a gift which a testator makes in his will in favour of the legatary, and which is to be paid by the heir.

§ 2.

§ 2.

Thus a legacy is founded on the testator's will, who ought to declare it in a plain and distinct manner; whence it follows that a legacy cannot be made by signs.

But it is indifferent whether a testator declare his intention in a direct manner, (*verbis directis*), by expressing himself, for example, thus: *My heir shall pay one hundred rix-dollars to Mævius*; or if he express himself in an indirect manner, (*verbis obliquis*), by saying, for example, *I require my heir to pay one hundred rix-dollars to Mævius*.

§ 3.

It is principally requisite for the validity of a legacy, that it be made by the testator in his will; whence it follows, that it is supposed that he is capable of making a will.

A legacy is not then valid, a) When the testator is incapable of making a will; b) When the legacy is not made in a will, but in a codicil, or when the heirs intestate or at law are required only by a billet or note to pay the legacy.

§ 4.

Those who reap any advantage from the will, are the only persons whom the testator can bind to pay the legacies: among these are, a) The first heir whom he appoints; b) The second heir, whom he substitutes to the first, whether he be an heir direct or in trust; likewise, c) The heirs of the heir whom he has nominated; but he can only impose that burden on this last to the extent of the portion to which he has been called to succeed. The reason of which is, that the heir of the heir is also bound to be answerable for the testator's deeds. In fine, d) The testator is also intitled to burden the legatary with restoring the

the legacy to a third party, whether after a certain time, or after the legatary's death.

N. 1. When a testator burdens those who reap no advantage from his will to pay the legacies left by him, for example, if he order his son whom he disinherits to pay a hundred rix-dollars to Caius, the legacy is invalid, even though it were made in favour of a pious community.

N. 2. Moreover, it is plain that the substitute is also bound to pay the legacies with which the heir nominated was burdened, unless the testator have expressly ordered the contrary.

§ 5.

Legacies can be left only to those who are capable of receiving by will; but it is sufficient if the legataries have a capacity at the time of making the will and of the testator's death, and their incapacity in the interval between these two times could do them no prejudice.

N. 1. Among capable persons are reckoned authorised bodies or colleges, religious communities, cities, or churches, &c.; but what is left in legacy to those bodies or communities belongs to them, and the particular persons who compose them cannot demand it to be divided in order to their drawing their share.

N. 2. When a legacy is made to a bishop, to a prelate, to a pastor, to a burgomaster, &c. the chapter, church, city, &c. cannot appropriate to themselves the legacy, unless the will at the same time mention those who shall succeed them in their offices.

§ 6.

When a legacy is made in general in favour of the poor, without expressing any place, the preference shall be given to the poor of the church of which the defunct was a member.

N. 1.

N. 1. When the testator was member of no particular church, or was a stranger or foreigner, the legacies shall belong to all the poor of the place in which he had his residence.

§ 7.

When a testator shall make a legacy to his poor relations in general, the preference shall be given to, a) The relations who have no fortune, and whom their age or indisposition, &c. incapacitate from gaining any thing whatever; and, b) After them shall be preferred those of the relations who are obliged to labour with their hands to gain a subsistence, even though they had otherwise some little fortune; c) When there are several poor relations who are to have a share in the testator's liberality, it must, nevertheless, in making the distribution, be considered what debts they have, the number of the children with which they are burdened, and the rank which they hold, &c. and we refer ourselves entirely on this head to the discretion and judgment of our courts of justice, to whom we intrust this matter.

§ 8.

When a legacy is left to God, or to some saint, as is the practice in the Roman church, the legacies shall be laid out on the necessary expenses of the church, and of divine worship, as also in the maintenance of the poor, if there be no other means of providing for them. In this last case shall be admitted in general the poor of the place in which the testator had his residence, unless, when the legacy is made to a saint, there were some church of which that saint was the patron, which shall be preferred; and if there be several churches of the same order, the preference shall be given to the poorest.

§ 9.

In all the cases just mentioned the capital itself shall not

not be touched, but it shall be laid out on good security, and the interest of it distributed to the poor. The case would be otherwise if it were but a small sum, given with an intention to be distributed to the poor.

N. 1. The distribution shall be made in chapters by the chapter and the elders, in churches by the ministers and elders, in hospitals by their administrators, whom we intrust with that care by these presents, recommending to them to make the division of the alms to the most necessitous, and conscientiously.

N. 2. We do not design however thereby to deprive of the distribution those in whom charitable testators shall have a confidence, and whom they shall name in their wills, to distribute their liberality, who shall continue intrusted with it.

§ 10.

A testator may leave a legacy to an unknown person, provided the person can be known afterward; wherefore a legacy left to a posthumous child is valid provided the child be born alive.

§ 11.

The same thing may be left in legacy jointly to two or more legataries; if the one happen to fail, the heir nominated shall acquire his share, and not the other legatary, because we have entirely abolished the right of accretion.

§ 12.

Legacies cannot be left, 1.) To such as are incapable of receiving by will; among whom are reckoned Pagans and Jews, as well as such as are not of one of the three religions tolerated in the empire. See above, § 5.

2.) As to the legacies which are reckoned as not executed (*pro non scriptis*), and to such as are left to

persons who are deprived of them on account of their unworthiness, they shall be treated of below, tit. XIX. art. V. & VI.

3.) Neither can a legacy be left to a person so unknown as not to be discovered, whatever inquiries are made about him.

4.) A testator cannot leave a legacy to the heir whom he has appointed, because this last would be at the same time debtor and creditor; but, a) He may leave a legacy to his heir's children. b) He may also leave a legacy to his heir when there are coheirs; but in this case a distinction must be made whether he have burdened the coheir alone with paying the legacy, or if he have ordered in general that a hundred rix-dollars shall be paid to the heir.

In the first case, the legacy shall be taken wholly out of the coheir's portion; but in the second, the legacy shall subsist only proportionally to the share which the coheir ought to pay of it, and consequently only for the half, when there are but two heirs. And with respect to the other half, which the heir would be obliged to pay to himself, the legacy shall be invalid, and that half shall remain in the mass of the succession.

5.) For the same reason the legacies which a testator might leave of the same thing to his two heirs would be invalid, unless there were also a third heir; for in this case the legacy shall be valid proportionally to what that third heir shall be bound to pay of it, that is to say, for the third, and the two other thirds which the two heirs should have paid to themselves shall remain in the mass of the succession.

§ 13.

When a testator shall nominate several heirs, and shall leave in legacy to one of them a thing or subject by way of *præcipuum*; that is to say, which is to be deducted

ducted before proceeding to the division, the heir shall acquire the thing in right of heir, (*jure heredis*), with regard to the share which he owes to himself, and by right of legacy, (*jure legati*), with regard to the shares in which the coheirs are bound to him.

§ 14.

A person has usually a right to leave in legacies all kind of subjects, moveable or immoveable, corporeal or incorporeal; legacies may also consist in single things, or in a generality of effects, (*in rebus singulis ac universis*); likewise in things of a certain species, of a certain kind, or of a certain quantity; the legatary may even be bound to do certain things, (*facta*.)

§ 15.

Thus a man may leave in legacy, 1.) Both personal servitudes, namely, usufruct, use, and inhabitation; and real servitudes. These two kinds of legacies shall be treated of in titles IV. and V. following.

§ 16.

II.) A testator may leave in legacy, in the second place, a generality of effects, (*res universas*); he may consequently give all his effects (*omnia bona*) to the legatary; as also a portion of his effects, and even a portion of the succession, but not all the succession, (*totam hereditatem*.) See below, § 35.

§ 17.

In a legacy of all the effects (*omnium bonorum*) is included every thing which makes a part of the testator's effects, both the subjects moveable and immoveable, and those corporeal and incorporeal.

N. 1. Such a legatary is not an heir, but all the rights of the succession, both active and passive, (*jura activa et passiva*), solely concern the heir appointed, who only can raise the hereditary actions, (*actiones hereditarias*),

reditarias), and be sued in virtue of these actions.

N. 2. But the heir shall not be obliged to deliver the effects to the legatary till after deducting the debts due by the defunct, (*nisi deducto ære alieno*); and as to the Falcidian fourth, he shall not have a right to deduct it.

N. 3. If he be afraid to act as heir, the legataries shall not suffer for that reason, but, on their account, the succession shall be reckoned in law as if it had been accepted, (*pro adita*), and shall moreover fall to the heir intestate; but if the latter refuse likewise to accept it, a trustee shall be established on the succession.

N. 4. We shall explain below, title IV. what is to be observed when all the effects are not left in legacy, but only the usufruct of all the effects, (*usufructum omnium bonorum.*)

N. 5. When a testator shall leave in legacy a portion of his succession, (*portionem hereditatis*), the legatary shall not thereby become heir, and shall not acquire an hereditary right, consequently he cannot raise the action *petitio hereditatis*, nor sue the creditors of the succession, nor be sued by them; the reason of which is, that he does not acquire the succession in virtue of an universal title, but by a particular title, namely, by a legacy, (*titulo legati.*)

N. 6. He may nevertheless be bound by the heir to bear the burdens, and pay the debts proportionally to the share allotted to him.

N. 7. The heir has also the choice, either of giving to the legatary his portion in kind, and of yielding to him, for example, the actions in proportion to what is left him in legacy, when the succession may be conveniently divided; or to pay him the value of his portion.

In the first case, the legatary has a right, by virtue of

of the cession made to him to raise against the hereditary creditors the direct action, (*actionem directam.*)

N. 8. When one has left in legacy a share of his effects, (*portionem bonorum*), the legatary is not obliged to take any burden upon him, but the heir ought to deliver him his share, after deducting the burdens; for among the effects is reckoned only what remains after the debts are paid.

N. 9. When the person who is obliged to pay the legacy left to the legatary of a portion of the effects, shall have received any fruits after the testator's death, he shall not be obliged to be accountable for them to the legatary, provided he have not been backward in paying the legacy.

§ 18.

III.) A person may, in the third place, leave a legacy of a thing of a certain kind or species, (*genus*), that is to say, of a thing of which there are several individuals of the same species among the effects left by the testator. Thus the legacy which a testator shall leave in general of a horse, of a sheep, of an ox, of a house, of a farm, of a dog, &c. shall be valid, when he shall leave horses, sheep, houses, farms, dogs.

But it is asked to whom ought the right of choice among the different individuals to belong? It appears just to allow the choice to the legatary whom the testator designed to favour, even though the testator had burdened the heir with giving him a thing of a certain species, for example, a horse in general.

N. 1. But the legatary has not a right to chuse what is best; he must be satisfied with what is a medium between the best and the worst; and if he cannot agree with the heir upon the choice, the judge shall settle the difference. The case would be otherwise, if the testator had formerly given the choice or option to the legatary. See the title which treats of optionary legacies, (*de optione legata.*)

N. 2.

N. 2. When a testator has but two things of the same species, the legatary shall be obliged to content himself with the least.

N. 3. But if there be but one at the time of the testator's decease, it shall belong to the legatary.

It is requisite, for the validity of a legacy of a thing of a certain kind or species, 1.) That the thing be existent among the testator's effects: for, if a testator leave a legacy, for example, to any one of a horse in general, the legacy shall be null, if the testator have no horses, and the heir shall not even be obliged to pay the value of one, because this legacy is equal to that of a thing unknown, (*rei ignorata*). The legacy must, 2.) Be capable of procuring some advantage to the legatary; whence it follows that the legacy of a beast, or of an animal in general, would be null, by reason that the legacy might be paid by delivering to the legatary, for example, a mouse.

§ 19.

IV.) A testator may, in the fourth place, leave in legacy a certain quantity, and declare, for example, that he leaves to Titius a hundred rix-dollars, ten barrels of wine, two wispels of rye.

When the testator, in leaving in legacy a certain quantity, has added the stock or vessel out of which the quantity may be taken, a distinction must be made whether the stock was mentioned *demonstrationis gratia*, that is to say, to shew out of what place that quantity is to be taken, or *taxationis gratia*; that is to say, to rate or value the legacy, which is confined to the produce of the lands or stock, or content of the vessel.

N. 1. It is usually presumed, that the testator added the lands, or the vessel, only to shew where the quantity left in legacy was to be found, (*demonstrationis gratia*). Whence it follows, that the heir

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is bound, when there is not found, in the place pointed out by the testator, all the quantity left by him in legacy, to supply what is wanting of it; for though the testator may have thought that the quantity left by him in legacy would be found there, that mistake of his ought not to prejudice the legatary. Thus, when a testator shall leave in legacy a hundred rix-dollars out of his strong box, ten barrels of wine of his vineyard or out of the tun, N^o 1. two bushels of rye out of his farm, the heir is obliged to give the whole quantity left in legacy, even though he should not draw the half of it out of the lands, out of the vineyard, or out of the farm, or though he should not have found in the tun, or in the strong box, the half of the quantity which the testator has left in legacy.

N. 2. The case would be otherwise, if it appeared that the testator designed to limit his liberality to what might be produced out of the lands, or found in the tun or in the strong box; for example, when he leaves in legacy to Caius the incomes of his lands, which he rated at a thousand rix-dollars, or the ten barrels of wine which might be produced of the next vintage, or the four barrels of wine that may be found in the tun, N^o 1.; or the thousand rix-dollars which are in the strong box; in these cases it is reckoned that the lands, or the vessel, was added to the legacy, (*taxationis gratia*), to point out precisely what the testator designed to leave in legacy, namely, the quantity which might be drawn out of the lands, or which might be contained in the vessel. And, in this case, the heir shall not be obliged to give to the legatary more than shall be drawn out of the lands, from the vineyard, or from the farm, or than shall in fact be found in the tun, or in the strong box.

N. 3. When the lands, from whence the legacy is to be drawn, happen to be alienated, the legatary may exact the quantity left him from all such as are
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in possession of the lands : the reason of which is, that the lands themselves are answerable for it.

N. 4. When a testator shall bequeath a capital sum, under the condition, that, as long as the heir shall not pay the legacy, he shall pay the interest of it at eight *per cent.* the heir nevertheless shall be obliged to pay the interest only on the footing of the King's rate.

§ 20.

V.) A man may, in the fifth place, leave in legacy an expectation, (*spem*) ; for example, when a testator bequeaths a thing which was promised to him conditionally, or which was carried off from him by the enemy, because there is, even in this last case, some hopes of recovering it, by the law of reprisal, (*jure postliminii.*)

We have shown elsewhere, that this legacy of an expectation gives a true right to the legatary, though it be dependent on an event, and that, consequently, the legacy is pure and simple ; it is only the obligation to pay it which is suspended, and which depends on an uncertain event : wherefore also this legacy is transmitted to heirs.

N. 1. It is a legacy like the preceding, when a man bequeaths the fruits which shall arise from an heritage ; for when no fruits arise from it, the heir is not obliged to furnish any to the legatary.

§ 21.

VI.) The testator has also a right to leave in legacy a thing in dispute, (*rem litigiosam*) ; that is to say, a thing on which another has formed claims, and concerning which there is a law-suit.

But, in this case, the heir shall be obliged to give to the legatary only what the judge shall decree for him ; provided always that he shall prosecute the suit at his charges, and that the legatary may interpose

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in his own name, (*suo jure*), in case the heir do not bestow, on the prosecution of the cause, all the diligence requisite.

N. 1. That takes place, however; only when the testator knew that the thing was disputed, (*res litigiosa*), and it is the heir's business to prove that the testator knew of it; for, if the testator was ignorant of it, the heir is obliged to pay the legacy in full, or to pay its value; and the legatary cannot be constrained to wait the issue of the law-suit.

N. 2. When the heir gains the law-suit, the legatary, who is by right (*ipso jure*) the proprietor of the thing left in legacy, is entitled to redemand it from all such as are in possession of it.

§ 22.

VII.) A person may, in the seventh place, bequeath a common thing or subject, (*rem communem*), that is to say, a thing in which others, besides the testator, have also a share: but such a legacy will have its effect only for the share which belonged to the testator.

§ 23.

A man may also leave in legacy the right which he has in a thing or subject belonging to another, (*jus in re aliena*); for example, the right of *emphyteusis*, or long lease, of surface, &c. (*emphyteusin et superficiem*;) but likewise, in this case, the legacy is valid only so far as the testator's right subsists, and ceases to have any effect when that happens to be extinguished.

N. 1. When the testator acquires in full right (*pleno jure*) before his death the thing bequeathed, by virtue of what is called in law consolidation, (*per consolidationem*), the heir is obliged to pay the legacy completely.

§ 24.

VIII.) A man may, in the eighth place, bequeath a thing

thing of which he has indeed the property, but which is pawned to another, (*rem alii pignore datam.*)

N. 1. When the testator knew the thing was pawned, which the legatary shall be obliged to prove, the heir shall be bound to pay the debt for redeeming the thing left in legacy, and to deliver it to the legatary, even though the latter might have known that the thing bequeathed was pawned to another: this obligation of redeeming the thing left in legacy shall likewise fall upon the heir, when the testator shall have pawned it after the will was made.

N. 2. If the testator were ignorant that the thing left in legacy was pawned, it would belong to the legatary to redeem it, unless the testator had expressly ordered the heir to redeem it, even in this case.

§ 25.

IX.) A person may, in the ninth place, leave in legacy a thing belonging in property to the heir, (*rem heredis*); for he is obliged to be answerable for the testator's deeds.

N. 1. If the heir, being ignorant of this settlement of the testator, had alienated the thing left in legacy, he would be obliged to pay its value to the legatary; but if he alienated it fraudulently, he would also be obliged to be accountable to the legatary for all his damages and interest, which the latter would be allowed to prove by his own oath *in litem*.

§ 26.

The testator has also a right to leave in legacy a thing belonging to the heir of the person whom he makes his own heir. See above, § 4.

§ 27.

X.) A testator may, in the tenth place, bequeath a thing which does not belong to him, (*rem alienam*), when he knows that it does not belong to him; and,

in this case, the heir will be obliged to buy the thing left in legacy, to deliver it to the legatary, or to pay him the value of it.

N. 1. When the testator did not know that the thing left in legacy belonged to another, but thought it was his own, the thing left in legacy cannot be demanded, and the heir shall not even be obliged to pay its value. The case would be otherwise, if the legacy had been left to a person related or allied to the testator in the third degree.

N. 2. When it is uncertain whether the testator knew that the thing belonged to another, the legatary shall be obliged to prove that the testator knew that it was not his own.

N. 3. When the testator, after having bequeathed a thing which he knew did not belong to him, afterwards acquires it, it must be distinguished whether he have done so gratuitously or for an onerous cause, for example, by a purchase.

In the first case, the heir is not obliged to pay the legacy. The case would be otherwise if he had not obtained the thing itself, and had only acquired its value gratuitously; for he who has received only the value of the thing, has not acquired the thing itself.

In the second case, the heir is obliged to pay the legacy; the reason of which is, that it is presumed the testator bought it, that the legacy might not be ineffectual.

N. 4. If the testator had acquired only a part of the thing left in legacy, the heir would be obliged to deliver to the legatary only the part which the testator has acquired.

§ 28.

XI.) A testator may, in the eleventh place, leave in legacy a debt (*nomen*); that is to say, what a third party owes him: in this case, the heir is not obliged to pay to the legatary precisely the sum due, but it

is sufficient to have yielded to him the action; for, by that cession, the legatary has a right to raise even the direct action against the third party debtor to the testator.

§ 29.

XII.) We have already given notice above, that works to be done may be left in legacy; a man may, for example, ordain his heir to repair Caius's house, to free him of his debts, &c.

N. 1. A person may leave in legacy personal services, or handy-works, (*operas*), and charge his heir with them. When the testator shall dispose of the labours of a third party in favour of the legatary, the heir shall pay him the estimation of them.

N. 2. When a person leaves in legacy services or labours, (*operas*), the obligation of executing the testator's will does not begin from the testator's death, but from the day that the legatary demanded the performance of the defunct's settlements.

N. 3. This legacy of labour or services is not lost entirely by not using; it would be lost however, a) By usucapion, if the legatary had demanded the execution of the testator's settlement, and the heir had refused it; b) And by disuse continued for thirty years. See above, book III. tit. V. § 26. and *ibid.* § 36.

N. 4. This legacy of labours or services is not a servitude, unless there be two neighbouring estates or heritages, and the labours be for the advantage of one of the two subjects.

N. 5. It is requisite that the works to be done, (*facta*), be not extravagant, infamous, or against good manners, for such legacies would be invalid.

N. 6. It is also necessary that the works to be done, (*facta*), that is to say, the engagements which the testator imposes, be things of which the testator may dispose: thus, when the testator orders his heir to pay the debts of Caius, who has been proscribed, that
legacy

legacy is invalid, because the testator has not a right to leave a legacy to a proscribed person,

§ 30.

I.) A person cannot leave in legacy things which are not subjects of commerce, and which cannot pass from the testator to the use of the legatary; among these things are reckoned, a) Things common by the law of nations; b) Things sacred, holy, and religious; so that the heir is not even obliged to pay their estimation to the legatary, nor the fine or penalty, which the testator has annexed to the non-performance of his will.

N. 1. This legacy would not become valid, even though the thing left in legacy should return into commerce after the will was made. The reason of which is, that what is null from the beginning cannot by any means become valid afterward.

N. 2. The case would be otherwise, if the thing were out of commerce only with respect to the heir, (*extra commercium heredis*), in which case he shall pay its valuation to the legatary.

N. 3. The legacy mentioned would likewise be valid, if the thing were bequeathed only conditionally, namely, when it shall cease to be out of commerce.

N. 4. In fine, it must be observed that things sacred may be left in legacy for a sacred use, and things religious for a religious use.

§ 31.

II.) A testator cannot, in the second place, leave in legacy a thing belonging in property to the legatary, (*rem legatario propriam*), at the time of making the will, even though he may have thought that the thing was his own, and that he had a right to dispose of it. This legacy shall not even be valid, though it should happen afterward that the legatary should fairly alienate

alienate the thing left to him in legacy; neither can the legatary claim its value from the heir.

N. 1. The case would be otherwise if the legatary's right in the thing left to him in legacy were limited to a certain time, or were revocable: for, in this case, the heir would be obliged to procure to the legatary the full property of the thing left in legacy, and to deliver it to him free from all burdens.

2.) If the testator had annexed the condition, namely, *when the thing shall cease to belong to the legatary*, in which case the heir shall be bound to pay the legacy, when the condition shall happen to exist.

3.) If the testator really believe that the thing which he leaves in legacy belongs in property to the legatary, and if, nevertheless, it really belong to the testator, the truth of the fact is preferred to the testator's mistake, (*plus enim est in veritate quam opinione.*)

4.) If the legatary have acquired the thing left in legacy only after the will was made, in which case the heir is bound to pay him the value of it.

§ 32.

III.) A legacy, in the third place, is not valid, when the testator leaves in legacy a thing which is not his own, and of which he believed himself the owner, and that he could dispose of it. See above, § 27.

§ 33.

IV,) A legacy, in the fourth place, is null, when the testator bequeaths a thing which is no longer existent; for example, when he leaves in legacy his horse which is dead, or an estate which was sunk by an earthquake, &c. And, in this case, the heir is not obliged to pay the value of the thing left in legacy, nor the penalty annexed by the testator to the non-performance of his will.

N. 1.

N. 1. The case is otherwise if the thing may exist, though it does not actually exist: see above, § 20. In the mean time, the heir is obliged to give security for all the time the uncertainty or hope continues.

§ 34.

V.) A legacy is not valid, in the fifth place, when it is useless; that is to say, when the legatary can make no use of it, for example, when a beast or an animal, in general, is left him in legacy; see above, § 18.; or when a debtor leaves in legacy to his creditor what he owes him.

The case would be different, if the legacy contained more than the debt; for example, if the debtor left in legacy, purely and simply, what he owes to him only conditionally; or, if the debtor was indebted to the creditor only in virtue of a personal obligation; for the legatary acquires, by the legacy, a real action: likewise, if the debtor had a right to object an exception, which falls in law by reason of the legacy; or, in fine, if the creditor received any advantage with respect to the place of payment, &c.

N. 1. When what the legacy contains more than the debt happens to cease, after the will was made, and before the testator's death, the legacy subsists because it was once valid; but, if its utility cease after the testator's death, the legacy does not thereby become useful.

N. 2. When a testator leaves in legacy a hundred rix-dollars to his creditor, without mentioning what he owes him, this legacy ought to be paid in particular; and the heir ought to pay the hundred rix-dollars to the creditor besides the debt, even though the legacy should amount to the same sum: the heir could not then object compensation to the creditor, unless he could prove that the testator's intention was in fact to make no difference between the legacy and the debt.

§ 35.

VI.) A testator cannot, in the sixth place, leave in legacy the whole succession: the reason of which is, that such an universal right cannot be transferred by a singular right, (*titulo singulari*;) but it ought to be transferred by an universal right, (*titulo universali*;) nevertheless, it has been seen that a man may leave in legacy a part of the succession, and we have treated above of the effect of that legacy. See § 16.

§ 36.

VII.) It has been decreed by the Roman laws, that a person cannot leave in legacy things belonging to a house; for example, doors, windows, statues, columns, &c. unless the testator had two houses, and the things named were transferred from the one house to the other, or unless they were left in legacy for raising a building for the public use, (*operis publici*), or to pay a public debt, (*debitum publicum*): but as this prohibition of the Roman laws is destitute of all foundation, our will is that that sort of legacies should be valid.

§ 37.

VIII.) In fine, it is demanded whether a testator may leave in legacy the same thing twice to the legatary? To resolve this question, a distinction must be made whether the legacy consist in a body, or in an individual, or in a quantity,

When the testator has left in legacy a body or an individual, (*speciem vel corpus*), the heir is obliged to pay the legacy but once; even though the testator may have left several things of the same species: nevertheless, if he have nominated two heirs, and had burdened both with delivering to the legatary one and the same thing, in this case each of the heirs would be bound to deliver such a thing to the legatary, supposing several of the same kind to be in the succession;

succession; but if there were but one thing of that kind, the one shall deliver the thing, and the other the valuation, even though the legatary may have at first required and obtained the thing.

When a testator leaves in legacy the same quantity at different times, it is usually sufficient to deliver it once only; nevertheless if the legatary could prove that the testator's intention was to give him two legacies of the same sum or quantity, it must be twice delivered to him; for example, if the testator have bequeathed the same sum to the legatary in two valid wills, or if the second sum were left in different money, or for a different cause, or on another condition, or to be paid in another place, or at another time; or if the quantity or sum be different; or if the testator have burdened several heirs with paying it; in which case the legatary shall have a right to exact it from each heir in particular.

§ 38.

Moreover, a testator may annex at his pleasure clauses to the legacies which he leaves, which may contain either a condition or a certain day, or a description, (*demonstrationem*), or a cause, or a method. They shall be treated of below in title XVI.

§ 39.

A testator may also substitute to the legatary either in a direct manner or by way of trust; see above, § 14.

Note. When the legatary has been burdened with restoring the legacy to Caius, he may renounce it, and is not obliged to accept it in order to deliver it to the substitute; it is sufficient if he yield to him the actions which are competent to him against the heir.

And when the legatary is burdened with restoring only a part of the legacy, and renounces it entirely, he is not obliged to give up the actions which

he has with respect to the whole legacy, but only with respect to the share which has been given to a substitute, or entailed.

Moreover, we refer to what we have enacted above, concerning an universal feoffment in trust, or trust-deed, as being applicable in most things to the subject of particular trusts.

§ 40.

I.) The effect of a legacy with respect to the heir is, that he ought to deliver to the legatary precisely the thing bequeathed to him, or if it no longer exist, pay him its valuation.

N. 1. We shall see in title XVII. from what time the legacy is due, and may be demanded by the legatary.

N. 2. When there are several heirs, each of them is obliged to pay the legacy proportionally to the share which he has inherited, unless the testator have burdened with the legacy one only of the heirs, or unless he have himself settled the shares which each is to contribute for paying it.

N. 3. When the heir happens to die, it belongs to the substitute to pay the legacies.

N. 4. When the testator has left in legacy an estate to which the heir himself is bound in a duty of servitude, the latter must give to the legatary the enjoyment of this right of servitude, even though there were no mention made of it, neither in the will, nor at the time of delivering the estate: and one would not be founded in asserting that the person bound in the servitude, having been appointed heir, that right was extinguished by what is called consolidation, (*per consolidationem.*)

N. 5. The heir is obliged to deliver the thing left in legacy in the place appointed by the testator; if he have ordered nothing on that head, and if the legacy

gacy consist in a certain thing, it shall be delivered in the place in which it is found.

When the legacy shall consist in things of a certain species, or in a thing of a certain kind, or of a certain quantity, the heir shall be obliged to pay the legacy in the place of the testator's residence; which shall also be observed if the heir have carried the thing bequeathed to another place.

N. 6. The heir is obliged in certain cases to give security to the legataries. This shall be treated of in title XVIII.

§ 41.

II.) The effect of a legacy with regard to the legatary is, that he acquires the right which the testator had in the thing bequeathed, *ipso jure*, that is to say, even though he may have had no knowledge of the legacy.

N. 1. Thus when the testator leaves in legacy a thing belonging to him in property, the legatary acquires by right (*ipso jure*) the property of it; and when he bequeaths a subject on which he has a right of pledge or mortgage, or of servitude, &c. the legatary acquires the real right which the testator had, and consequently he acquires also by right (*ipso jure*) the actions confessorry, hypothecary, or of mortgage, &c.

N. 2. We suppose nevertheless, that the legatary has accepted the legacy entirely; for it cannot be accepted for a part only, unless it consist in a quantity, or in things which are different from one another.

N. 3. When the legacy falls because the legatary renounces it, it remains in the mass of the succession, even though it were a legacy of one and the same thing left jointly to two persons; for the portion of the legatary who renounces his legacy does not accrue to the other.

N. 4. Moreover, it is evident, that the heir cannot be obliged to pay those legacies till after having de-

deducted all the debts. The reason of which is, that a legacy is to be taken only out of the testator's effects, and that it cannot be known what effects he leaves till after having deducted all he owes.

§ 42.

The heir is obliged to deliver not only the thing or subject left in legacy, but also all its appendages: thus when a legatary demands, by an action *ex testamento*, the house which was bequeathed to him, the heir must deliver to him also all the pertinents, as barns, stables, shops, gardens, which are annexed or belong to the house, &c.

§ 43.

He is likewise obliged to deliver to the legatary all the accessions (*accessiones*) of the thing left in legacy; for example, whatever the subject bequeathed is augmented by means of alluvion; likewise the lambs which have increased the flock of sheep left in legacy; and the servitudes annexed to the estate left in legacy; likewise, what has been added to the thing bequeathed by the testator himself, for example, a house built by the testator on the space of ground (*area*) which he has left in legacy; unless the testator declare expressly, that the house shall not be included in the legacy.

Observe however, that if the house or the ornaments added by the testator happen to be destroyed before his death, the legatary has neither a right to demand the price of the house nor the materials.

§ 44.

The heir is also obliged to be accountable to the legatary for the fruits and advantages which he has reaped from the thing left in legacy after the testator's death.

Whence it follows, that he is also obliged to pay,
after

after that time, the interests of the capital sums bequeathed; otherwise he would be enriched by another's fortune.

§ 45.

On the contrary, the heir has a right to demand the expenses laid out by him for the preservation and melioration of the subject left in legacy; but among the expenses of which he may demand restitution are not reckoned those which he may lay out to enable him to deliver the legacy, for example, the charges of the law-suit which he must prosecute against the person who possesses the subject left in legacy, for he is obliged to bear those charges.

§ 46.

When the heir has occasioned any damage to the subject bequeathed by his own fraud, or by a great fault, (*per dolum vel culpam latam*), and even by a very slight fault, (*per culpam levissimam*); if he have been backward in paying the legacy, (*in mora præstandi*), he is obliged to indemnify the legatary, even though he were bound to restore the succession to another by virtue of a trust-deed.

§.47.

But the heir is not obliged to be answerable for casual misfortunes, unless he have been backward in paying the legacy, and unless it can be proved that the subject would not have perished in the legatary's hands, if it had been delivered to him at the time appointed.

In such cases it shall be the heir's business to bring the proofs which tend to exculpate him.

§ 48.

When a part of the legacy perishes, the heir is obliged to deliver to the legatary what of it remains. Thus when the legacy consists of a hundred sheep, if
ninety-

ninety-nine of them die, the heir ought nevertheless to deliver the hundredth to the legatary; for the flock subsists still in that sheep, such-flocks being liable to augmentation and diminution.

N. 1. When the testator has left in legacy a cow and her calf, the heir is obliged to deliver the calf, though the cow be dead; for these are two things different and principal, and consequently they are two legacies.

N. 2. When a man has bequeathed a thing of a certain species, or of a certain kind, for example, a horse in general, without describing him, and when all the testator's horses excepting one are dead, the legacy subsists in this last horse: but if all the horses were dead, the legacy would thereby be annulled. See above, § 18.

N. 3. When the part of the legacy which remains is only an accessory of the principal thing bequeathed, and such as cannot subsist alone, the legacy is null as to that accessory, when the principal thing happens to perish.

Thus when a testator has left in legacy a horse with the saddle and saddle-cloth, if the horse die, the saddle and saddle-cloth are not due to the legatary.

Likewise when a piece of ground is bequeathed with what is necessary for labouring and reaping, or a house with its furniture, if the testator happened to alienate the ground, or the house without the furniture and utensils, the legatary would not have a right to demand them.

§ 49.

When a testator leaves a legacy to a person, and annexes a penalty in case the heir do not execute his will, the latter shall be bound to be accountable to the legatary if he be backward in paying the legacy.

§ 50.

§ 50.

If the heir deny that the legacy is due, the legatary may demand the double of the value of the legacy.

§ 51.

III.) The principal effect of a legacy is, when the legacy is pure and simple, to give to the legatary a right to raise his action against the heir immediately after the testator's decease, and even before the heir has taken possession of the succession.

§ 52.

I.) The legatary acquires, in the first place, the claim of right, both direct and advantageous, by which he has a right to redemand the subject from all such as possess it.

But this action is ineffectual till the heir have really accepted the succession; the reason of which is, that the legatary ought to receive the legacy from the heir.

§ 53.

II.) When the testator does not bequeath the property, but another real right; for example, a right of servitude, or of pledge or mortgage, &c. the legatary acquires the action confessor, or hypothecary, or of mortgage, &c. We have shown above what is the effect of these actions.

§ 54.

III.) The laws have allowed to the legatary for the security of legacies a tacit hypothec or mortgage over all the effects that the heir hath acquired from the testator, and which he has free after all the debts of the succession are paid out of them. By virtue of this hypothec or mortgage all these effects are engaged to the legatary, till the heir have delivered to him the legacy.

The testator is also at liberty to give the legatary a
right

right of hypothec or mortgage upon the heir's own effects.

N. 1. The hypothecary action, or action of mortgage, does not take place, when the legacy consists in a certain thing, by reason that the legatary has in that case the claim of right; but the hypothecary action is competent when the legacy consists in an uncertain thing; for example, when the testator has left in legacy a thing in general, or a quantity.

N. 2. When the testator has burdened several heirs with paying the legacy, the legatary has a right to raise the hypothecary action, or action of mortgage, in supplement against each heir; the reason of which is, that the right of pledge or mortgage cannot be divided.

§ 55.

IV.) A legatary acquires chiefly the action *ex testamento*, which is a personal action, founded on a supposed contract: for the heir, by accepting the succession, obliges himself tacitly by that deed to fulfil the testator's will, and consequently to pay the legacy.

N. 1. Thus this action is allowed to the legatary, or to his heir, who may, by virtue of the defunct's settlement, require the thing left in legacy from the heir.

N. 2. This action is competent only against the heir who has accepted the succession, and who is thereby engaged to execute the testator's will. See the beginning of this section, and § 57.

N. 3. When there are several heirs, the action *ex testamento* may be raised for the whole against each heir, (*contra singulos in solidum.*)

The case would be different, a) If the testator had settled the shares which each heir was to pay; or, b) If the legatary have already raised the action against one of the heirs, in which case he cannot then sue the rest.

§ 56.

Legataries have also, in consideration of certain particular circumstances, other actions; for example, the action *legis Aquiliæ*, the action of robbery, (*furti*), &c.

They may also avail themselves of what are called in law *remedia possessoria adipiscenda*, &c. likewise, *remedium L. fin. C. de editto div. Hadriani tollendo*. The reason of which is, that the legacy itself is transmitted by law to the legatary, but not the possession of the thing left in legacy.

§ 57.

All those actions can be raised only when the heir has accepted the succession; see § 55.; or when the space for deliberating is elapsed.

§ 58.

It follows from what is said, that no legatary has a right to take possession of the thing left in legacy on his own proper authority; but he must receive it from the heir, or he must oblige the heir, by the actions just mentioned, to deliver it to him.

Neither has a man right, on his own proper authority, to take possession of the subject bequeathed, even though, a) The question were of a legacy left to a pious community; or, b) Though the heir were burdened with restoring the succession to another; or, c) Though he may not as yet have taken upon him the title and quality of heir; or, d) Though the testator may, in his will, have granted to the legatary a power, on his own proper authority, to take possession of the thing left in legacy; or, e) Though he may have provided for the legatary's safety by what is called in law *constitutum possessorium*; provided always that, in these two last cases, the heir will not allow the legatary to take, on his own proper authority, possession of the subject bequeathed.

§ 59.

This rule admits an exception; namely, when the heir consents to the legatary's taking possession of the subject bequeathed; or when the legatary has been, at the same time, named testamentary executor by the testator; or when the testator having allowed the legatary to take possession of the subject left in legacy, it is yet in the power of no person, (*possessio legati vacua*), and consequently the heir is not yet possessed of it.

§ 60.

The legatary who shall take possession of the subject bequeathed, in a clandestine and violent manner, shall lose his legacy, which shall return to the heir; excepting in the cases mentioned in § 58. *let. d* and *e*; namely, when the testator has given the legatary permission to take possession of the subject left in legacy: for, in these cases, the legatary can only be punished for the violence of which he may have been guilty, and that punishment shall be arbitrary.

§ 61.

We shall shew in title XIX. how legacies are annulled or revoked.

§ 62.

In fine, it must be observed, that when the testator left so many legacies or particular feoffments in trust, that they absorbed almost all the succession, and that there remained none of it, or almost none to the heir; the Roman laws allowed him, in this case, to deduct the fourth of all the legacies, which was called the *Falcidian fourth*.

As the Falcidian fourth was only introduced that wills might not be invalidated, and as it occasioned very many subtilties which have been fruitful sources of law-suits, we have thought it necessary to abolish, by these presents, the Falcidian fourth, as we have already

ready abolished the Trebellianic fourth, and we establish as constant and permanent laws,

I.) That when an heir shall be afraid to accept the succession on account of the great number of legacies with which it is burdened, the succession shall be by law reckoned as accepted, (*ipso jure pro adita*), in so far as that shall be necessary for the preservation and validity of the legacies; that, moreover,

II.) The succession shall belong to the heir substituted, and, in case he likewise reject it, it shall fall to the heirs intestate or at law.

III.) In fine, that failing the heirs intestate, a curator or trustee shall be established on the succession, who shall be burdened with administering it, and with paying the legacies.

§ 63.

We have already shown, in general, what is understood by legacies; who they are who have a right to leave them, to whom they may be left, and what the subjects are which may be left in legacy.

As testators often happen to leave their legacies in general terms, which may be differently interpreted, and as in such cases the testator's intention is doubtful, we are about to lay down, in the following titles, some principles which will show how equity would have those general expressions explained.

T I T L E III.

Of annual and monthly, &c. legacies.

(*De annuis et mensstruis legatis.*)

§ 1.

A Testator may also leave legacies to be paid every year, or every month: he may, for example,

3 H 2

order

order his heir to pay to Caius a hundred rix-dollars a-year, or a-month, &c.

§ 2.

Which may take place, even though the testator may not have used the expressions *year* or *annually*, &c. as when he may, for example, order his heir to give to Caius's daughter two wispels of rye *till she be married*.

§ 3.

We establish it as a general rule, that, in a dubious case, a legacy left for several years ought to be reckoned as an annual legacy.

§ 4.

It is likewise an annual legacy, 1.) When the testator bequeaths one hundred rix-dollars to Caius, to be paid him alternately every other year, (*alternis annis*.)

2.) And when he leaves him in legacy the inhabitation of his house. See the following title, § 11. n. 8.

§ 5.

3.) When the testator orders his heir to pay a certain sum, for example, three hundred rix-dollars in three years, the legacy is single, (*unum*); but the heir shall not be entitled to claim exemption from payment till the third year.

Wherefore the legacy shall be divided in three parts, and the legatary shall have a right to demand one of them every year.

Thence it follows, that, from the moment of the testator's death, the legatary has an acquired right in the whole legacy, and that, consequently, he transmits it to his heirs, supposing even he should happen to die the first year. For it is only the payment of the legacy which is divided into three years.

N. 1. If the testator have regulated the portions of the legacy, which the legatary may demand every year, the heir shall comply with that regulation.

But if the testator have left to the legatary himself a liberty to demand those portions, he shall not have a right to demand the whole legacy at once in the first year, and the judge shall determine the portions which he may require every year.

§ 6.

4.) It is a question, if a legacy of a certain annual income be an annual legacy. A distinction must be made, whether the testator have left in legacy those annual incomes, (*annuos redditus*), to a private person, or if the legacy of them be left to a body corporate, or a community.

In the first case, it is an annual legacy (*legatum annuum*), and, in the second case, it is one single and perpetual legacy, (*unum simplex et perpetuum*), of which the effect will be explained below, in § 9. and 10.

§ 7.

When a testator has left in general an annual legacy, without determining its *quantum*; for example, if he have ordered the heir substituted to maintain Caius all his life-time, without particularising any thing, his maintenance must be regulated on the footing that the testator in his life-time used to give to Caius; otherwise it shall be determined at a certain sum yearly, which shall be proportioned to the testator's fortune, and to the legatary's condition; for it is a kind of legacy of alimony, (*species alimentorum legatorum*.)

§ 8.

When the testator shall leave in legacy a stock or subject, out of which the sum or quantity of the annual legacy may be taken, a distinction must be made, whether the stock or subject were added by the testator,

tor, to show that he bequeaths only what that subject shall produce, (*taxationis gratia*), or if it were only added to show to the heir, whence he might take the sum or quantity left in legacy, (*demonstrationis gratia*.) In the first case, the heir is not bound to furnish all the sum or quantity of the annual legacy, if the subject do not produce it, but he is bound to do so in the second case. See above, part II. book VIII. tit. II. § 19.

§ 9.

The effect of an annual legacy is, that it cannot be reckoned as a single legacy, (*unum*), but that it includes several legacies, which are renewed every year; so that it is the first species of legacies only that is a pure and simple legacy, (*purum*), on which the legatary has an acquired right, (*jus quæsitum*), and which he transmits to his heirs, if he happen to die in this first year; whence it follows, that the heirs acquire all the fruits of the subject, even those which are yet on the ground, or hanging on the trees.

It is in this also, that an annual legacy differs from a legacy of an usufruct. For the heirs of the legatary, to whom a legacy of an usufruct is left, do not acquire such fruits, even though they were already ripe. The reason of which is, that an usufructuary acquires a right only by the effectual receiving of the fruits. See part II. book IV. title III. § 17.

As to the legacies of the following years, they include all the tacit condition, that the legatary shall be in life, in order to be entitled to demand the legacy of every year which shall follow. Thus, when the legatary shall happen to die before beginning the second year, the legacy of that second year shall be void and of no effect, and the legatary shall not transmit it to his heirs.

It follows from the principles just established, that,
if

if the legatary do not demand the annual legacy within the space of thirty years, the whole annual legacy is not thereby prescribed, but only the legacy of the first year, and that for prescription of the legacy of the second year, there must be thirty-one years, and so on.

§ 10.

It follows from what has been said, that it is not an annual legacy, 1.) When such a legacy is left to a body corporate, or to a community; for example, for the maintenance of a pastor, or to a school, &c. or to a society, on condition of making every year an oration in praise of the testator. See above, § 6.

But, 2.) When the testator leaves in legacy to any one a thousand rix-dollars, and when, without designing to favour the heir, he orders him to make payment of it yearly, at the rate of one hundred rix-dollars a-year, it is an annual legacy, and there are, consequently, in such a case, as many legacies as there are years. Whence it follows, that the legatary has a right only in the legacy of the years into which he has entered, and that he does not transmit to his heirs the legacy of the years which he has not begun.

§ 11.

Annual legacies cease to have any effect, 1.) When the legatary happens to die before having commenced the year; that is to say, that his right which he would have had on all the following years, if he had lived, is extinguished for all those years which he has not begun. See § 9.

The case is different when the annual legacy is left either to a society or to a community; for, in this case, the legacy is pure, simple, and perpetual, (*unum et perpetuum*), and does not come to an end till the extinction of the society. It is likewise in that particular that it differs from a legacy of an usufruct, which comes

comes to an end after the expiration of an hundred years, as it has been found equitable, that property should not be without effect, and that the proprietor should not be eternally excluded from the advantages of his right of property.

2.) Annual legacies prescribe also by the thirty years prescription, which however is to be understood only of every year's legacy. See § 9. at the end, and § 10. n. 2.

Likewise, 3.) When the legatary happens to be proscribed, or when his effects are confiscated, in which cases the legacy returns to the heir appointed.

§ 12.

Annual legacies differ from a promise which is to be paid every year, (*annua promissione*), in this, that a promise which is made by a deed among the living is single, pure, and simple; so that the person to whom it is made acquires immediately a right over all the quantity promised, which consequently he transmits to his heirs when he happens to die.

The reason of the difference consists in the presumption, that the person who gets such a promise stipulated in his favour, had also his heirs in view; whereas a testator, in leaving a legacy, consulted only his own inclination for the legatary's person. Moreover, the rule concerning the annual promise, (*annuæ promissionis*), admits exceptions, when the contracting parties agree upon it otherwise, and fix a certain term in their agreement; for example, that the person to whom the promise is made shall enjoy that benefit either for ten years or during life.

T I T L E IV.

*Of the legacy of a personal servitude.**(De usu, usufructu, et habitatione legata.)*

§ 1.

WE have already observed in several places, that the personal servitudes, namely, usufruct, use, and inhabitation, may be left in legacy, and we have also shown in its place, in what the nature of those servitudes consists.

It is sometimes dubious whether a testator designed to leave a legacy of a personal servitude, and what he intended to include in such a legacy.

Our will is first, with respect to an usufruct, that what follows be observed.

§ 2.

When the testator has left in legacy simply the fruits, or the annual fruits of his subject or estate, it is a real usufruct.

§ 3.

When he has bequeathed to any one an estate or subject to enjoy it, he is reckoned to have given to the legatary only the usufruct, and not the property of the subject.

§ 4.

When the usufruct is left in legacy with the power of alienating, (*cum facultate alienandi*), the legatary acquires only the usufruct, nevertheless with the power of transferring it to others, or of transmitting it to his heirs; in which case both possess the subject left in legacy only by right of usufruct, (*jure usufructus*.) See above, part II. book IV. title III.

§ 8.

§ 5.

It is not a servitude of an usufruct when the testator leaves in legacy to any one the incomes of his estate or subject; for he does not thereby constitute a right of servitude, and the subject is not delivered to the legatary's management, but it is the heir's business to pay him his annual incomes.

N. 1. Moreover, the heir is obliged to be accountable to him only for the incomes which the estate or subject produced in the testator's lifetime; wherefore also the heir cannot be hindered from selling the subject, provided he give to the legatary sufficient security for the yearly income bequeathed to him.

N. 2. Neither has the legatary a right to claim lodging by virtue of this legacy, if the lodging itself produced before no income.

N. 3. Neither is the heir obliged to take upon himself unnecessary reparations, which ought to be deducted from the incomes. The case would be different if the reparations had been occasioned by the fault of the heirs.

N. 4. We have already treated above, title III. of what is to be observed with regard to the legacies of annual incomes, (*annuorum reddituum.*)

§ 6.

When a testator does not constitute a new servitude upon his estate in favour of the legatary, but bequeaths to him the servitude belonging to himself on the estate of a third party, for example, the servitude itself; for the laws do not know a servitude of a servitude, (*servitutem servitutis*), but he acquires simply a personal action, *ex testamento*, against the heir, to oblige him to allow him the enjoyment which the testator might have had, in virtue of the servitude of usufruct due to him.

§ 7.

§ 7.

When the testator bequeaths to one the subject, and to another the usufruct of the same subject, they are allowed both to receive the fruits of that subject: the reason of which is, that the fruits are also included in the legacy of the subject.

The case is different when the testator leaves to the one the property, and to the other the usufruct of the subject; for in this case this last enjoys alone all the fruits.

§ 8.

When the testator shall bequeath the usufruct of his house, and of all contained it, this legacy does not include the enjoyment of the things which he had in the house for sale, even though the legatary were the testator's own child, or supposing there were nothing else in the house which might be the object of an usufruct. Thus when the testator has put grain in it for sale, (and not for the use of his family), or when there are some *stein* or packs of wool in it, the heir is not obliged to leave the enjoyment of them to the legatary.

When the house happens to perish by fire, or by some other accident, the usufruct ceases to take place even with respect to the area on which the house was built.

§ 9.

When the testator has left in legacy to any person, for example, the usufruct for six years, and has ordered at the same time the legatary to restore it to Caius after the six years; if it happen that the legatary die before they are elapsed, the usufruct of the years which the legatary has not enjoyed does not belong to the person to whom he is charged to restore the legacy, but to the heir, who is not bound to deliver it to the feoffee in trust till after the six years are elapsed.

§ 10.

In the legacy of the usufruct of the whole effects (*in legato ususfructus omnium bonorum*) is included all the subjects, moveable and immoveable, corporeal and incorporeal, from which any advantage can be reaped, likewise the use of the subjects which the testator has acquired after he made his will, and which made a part of his effects at the time of his decease.

N. 1. Thence it follows, that when there is a house included in the legacy of all the effects, (*in legato omnium bonorum*), and it happens to be destroyed, the legatary preserves the usufruct of the area, because it makes part of the effects of which the usufruct was left to him in legacy. We have seen that the case is different, when one has left in legacy only the usufruct of a house. See above, § 8.

N. 2. When the testator has bequeathed to one all his effects, (*omnia sua bona*), and has left in legacy the usufruct of them to another, the two legataries come in competition, and share the usufruct between them.

But if the testator have bequeathed to the one only the usufruct of a certain thing, he alone receives the fruits of it, and the other to whom all the effects have been left in legacy enjoys all the other fruits.

N. 3. When a testator intrusted with a feoffment or trust-right in favour of the person whom he appoints his heir, leaves in legacy to a person the usufruct of all his effects, it is a question whether the usufructuary acquires also the enjoyment of the feoffment or trust-right, and whether consequently the advantages of the feoffment or trust-right which the testator is to restore to the heir be included in the legacy of all the effects, (*in legato omnium bonorum*)? We say that they are not included in it: the reason of which is, that the trust-right or feoffment in trust after the testator's decease is no longer among his effects, and that it falls by right at the instant of his death to the heir; whence

whence it follows that it is not included in the legacy of all his effects.

The case would be different, if the testator had expressly mentioned the feoffment in trust, by reason that the testator has a right to leave in legacy a subject belonging to his heir, and that the latter is bound to be answerable for the testator's deeds.

N. 4. In the legacy of the usufruct of all the effects are likewise included all the advantages that can be got by ready money, as the interests of principal sums; likewise the use that can be made of gold, of silver, of jewels, so far as they are serviceable for ornament.

N. 5. We have already shown in title III. § 13. that the usufructuary of all the effects is bound to pay all the debts secured on those effects, because there are no effects, and consequently no usufruct of effects till after the debts are paid; it would also be highly unjust, if the usufructuary had the enjoyment of the effects, while the heir were burdened with the debts, and bound to pay the interests of them.

When the usufructuary is afraid to accept the usufruct on account of the considerable debts with which it is burdened, he must refuse the legacy, and abandon it to the heir. See above, part II. book VIII. tit. II. § 62.

§ 11.

We have shown above, part II. book IV. tit. IX. what inhabitation is, and in what it differs from the usufruct and use of a house.

N. 1. Inhabitation may also be left in legacy to a body corporate, and to a republic or society.

N. 2. In the legacy of inhabitation are comprehended the shops belonging to the house, but only to lodge in them; likewise the houses contiguous and depending on it, when they have no separate entry; likewise the barns, the stables, but by no means the furniture,

furniture, even though it were only of wood, for example, tables, benches or forms, &c. far less are the gardens of the house included.

N. 3. When a testator who has several houses bequeaths the inhabitation, he is reckoned to have given the inhabitation of the house in which he usually and constantly resided at the time of his decease.

Whence it follows that he would not be reckoned to have had another house in view, even though for change of air he may have occupied another house where there is a garden, or though, on account of the pestilence, he may have removed elsewhere, as these steps cannot infer a presumption that he designed to change for perpetuity his usual residence.

When the testator, in leaving a legacy to any one of inhabitation, has left him the choice of the houses which he has in town, among these houses are also included those which are situated in the suburbs.

N. 4. A man may leave a legacy of inhabitation to several persons, either jointly or separately; and if one of the legataries happen to fail, his right does not accrue to the other legataries, but returns to the heir, who may dispose of it.

N. 5. When a testator leaves to any one a legacy of inhabitation, on condition *that he shall take care of the education of his relation*, it is a question whether the legacy ceases to have its effect when that relation happens to die. A distinction must be made here, whether his education were intrusted to a relation or ally, even in the third degree, or if it were intrusted to a stranger. In the first case the legacy is not annulled by the death of the person with the care of whose education he was intrusted, because it is presumed that the testator, in leaving this legacy to a relation or ally, had a regard not only to the burden and trouble of his education, but also to the relation of those
to

to whom it was intrusted. In the second case the legacy ceases to have its effect.

N. 6. When the testator bequeaths the inhabitation of a house, with what is contained in it, the furniture is also included which was there when the testator made his will, but not what the testator put there afterward, and it lies upon the heir to prove that it was put there after the will was made.

N. 7. The legacy of inhabitation includes several legacies, for it is renewed every year. See the preceding title, § 4.

N. 8. The legacy of inhabitation ceases to take place when the legatary comes to die, and his right consequently is not transmitted to his heirs.

§ 12.

The legacy of the services of a slave, (*operæ servilis*), which was much used, and of great advantage among the Romans, does not take place in the countries under our government, where slavery is abolished, as has already been said above, part II. book IV. tit. II. § 4.

T I T L E V.

Of the legacy of a real servitude.

(De servitute prædiali legata.)

§ 1.

NO body can bequeath or constitute a servitude upon a subject or estate unless he be proprietor of it, and it cannot be constituted but in favour of the owner of a neighbouring estate or subject for its advantage. See above, book IV. tit. X.

N. 1. A person may tacitly bequeath such a servitude, for example, by leaving in legacy to one the inhabitation of a house, and to another the garden contiguous to the house: for in this case the last legatary acquires the right of passage (*servitutem viæ*) through the house, if there be not a separate entry for the garden.

N. 2. When the real servitude is acquired by the legacy, the delivery of it is not necessary, but the legatary acquires by right (*ipso jure*) the servitude, and if he be interrupted in using it, he has a right to raise the confessorial action, (*actionem confessoriam*.)

§ 2.

When several heirs are burdened with paying the legacy of such a servitude, the legatary has a right to require it wholly from each heir, if the servitude be of a nature indivisible, as are the servitudes *itineris*, *viæ*, &c. but when one of the heirs has allowed it to him, all the others are thereby freed from it. In this case however the latter cannot be exempted from being accountable for it to their coheir, proportionably to what it cost him, and the charges which he has laid out.

§ 3.

The legacy of a real servitude does not cease to have its effect by the death of the legatary; the reason of which is, that real servitudes are perpetual, (*perpetuæ*), and have a perpetual cause, (*causam perpetuam*), wherefore the legatary transmits the legacy to his heirs.

§ 4.

A person may likewise bequeath other real rights, for example, a hunting, tithes, a jurisdiction, a right of patronage, &c. in which cases legataries have the action called *confessoriam utilem*.

That

That one may leave in legacy the right of patronage, that must be done with the consent and knowledge of the consistory.

§ 5.

When a testator bequeaths to one who has no neighbouring estate or subject, a passage, a road, &c. (*iter, viam*), it is not a right of servitude, nor a legacy of a servitude; consequently the legatary does not acquire a real action, but only a personal right against the heir, to oblige him to procure for the legatary the enjoyment of those advantages.

§ 6.

When a testator has bequeathed to any one the right of servitude upon a neighbour's estate or subject, neither is it a legacy of a servitude; for there is no servitude of a servitude, (*servitus servitutis*); but if the testator reaped in fact any advantages from this servitude, the legatary has a right to demand them of the heir, and to raise against him for that purpose a personal action.

T I T L E VI.

Of the legacy of the portion which a husband preferably leaves to his wife.

(*De dote prælegata.*)

§ 1.

A Husband has a right to leave in preferable legacy to his wife the portion which ought to fall to the wife after the dissolution of the marriage.

§ 2.

This preferable legacy of the portion appears to be destitute of all effect, the wife receiving by means of

this legacy only what belongs to her, and ought to fall to her otherwise after her husband's death; nevertheless, as there is something more in the preferable legacy than in the portion, the legacy subsists and is valid.

In fact, 1.) The preferable legacy may be demanded immediately after the husband's decease; whereas, by the action for the portion, (*dotis actione*), the wife cannot demand the portion when it consists in moveable subjects till after a year is elapsed.

2.) The clauses added in contracts of marriage burdening the portion, are annulled by the preferable legacy. Thus when in a contract of marriage there was a clause, declaring, that the portion shall return to the husband's heirs, that settlement is void and without effect, when the husband leaves the portion in legacy to his wife.

3.) The preferable legacy of the portion has also this advantage, that it is not necessary to prove that it was really brought to the husband, for he acknowledges in the will that he has received it.

4.) The useful expenses (*impensæ utiles*) which a husband has laid out for the portion cannot be demanded by the husband's heirs, when the portion is left in a preferable legacy; neither can one in this case, on pretext of these reparations or expenses, retard or delay the restitution of the dowery or portion.

5.) When a wife redemands her portion after her husband's death in an ordinary action, the husband's heirs have a right to object to her the exception of competency, (*exceptionem competentiæ*), and to maintain that they cannot be obliged to restore it but in so far as their fortune can afford it, and that they are in a condition to do so: but this benefit does not take place when the husband has left in preferable legacy the portion to his wife.

§ 3.

When the wife has brought no portion to the husband, it is evident that the preferable legacy of the portion is as invalid as if the testator had left in legacy a thing which does not exist.

It would however be otherwise, if the testator, in leaving the portion in legacy, had, at the same time, described a certain thing or subject, or specified any sum or quantity; for example, if he had said, *I leave in legacy and restore to my wife the garden, or the thousand rix-dollars which she brought me in portion*; in which case the legacy would be valid.

When a husband bequeaths in preferable legacy to his wife the portion, which, by virtue of the agreement by which it was constituted, ought to be restored to a third party after the husband's death, the heirs will be freed from it, when they shall deliver it to that third party to whom it ought to be restored; and the wife, become a widow by her husband's death, shall not have a right to claim that the husband's heirs should also be accountable to her for the portion, and be consequently obliged to pay it twice.

The case would be different if the husband had left in preferable legacy to his wife the usufruct of the portion; for in that case the husband's heirs shall deliver the portion to those who settled it, but they shall procure for the wife the usufruct of the portion, or shall pay her its valuation.

§ 4.

When a husband has in his lifetime really restored the portion, and when nevertheless he leaves it in preferable legacy to his wife, the legacy shall be void and of no effect.

On the contrary, when a wife shall not have delivered her portion to her husband, or shall have taken it back against his inclination, if she happen to be-

queath it to her husband, he may after his wife's death demand the portion, and the wife's heirs shall be bound not only to restore it, but also to be accountable for all the fruits which the wife shall have received.

§ 5.

The preferable legacy of the portion ceases to have its effect, when it happens to perish, unless it were constituted with a valuation, which comes in place of a sale, or unless it consist in a thing in general, or in a quantity.

§ 6.

The preferable legacy, or the portion which a husband bequeaths to his wife differs from the legacy of the portion in this, that this last is not left to the wife by the husband, but by a stranger. We have treated of it, part I. book II. tit. IV. art. I. § 38. and 39.

The legacy of the portion includes always this tacit condition, namely, *if the marriage be completed*; for if it be not completed, the bride cannot demand the marriage-portion from the constitutor's heirs.

T I T L E VII.

Of the legacy which a creditor leaves to his debtor, to free him of what he owes him.

(De liberatione legata.)

§ 1.

WHEN a testator bequeaths to his debtor what the latter owes him, and consequently discharges him the debt, that legacy is called a legacy of liberation or exemption, (*legatum liberationis.*)

§ 2.

§ 2.

This legacy frees the debtor, not only from his personal obligation, but also from the real obligations, in virtue of which the testator might have raised a claim of right, or an action hypothecary, confessor, &c.

§ 3.

The release of a debt may also be bequeathed tacitly; for example, when the testator leaves in legacy to the debtor his obligation or bond, or his promissory note. The case would be different if he had only bequeathed a pledge; for in this case he would only have restored the security which he had received.

A release is also tacitly given, when the testator prohibits his heir to exact the debt from the debtor, or to prosecute for it, or when he orders his heir to reckon the debt as paid.

§ 4.

A testator may likewise excuse his debtor who has managed his affairs, or who has been his guardian or curator from clearing his accounts, or he may ordain his heir not to request him to give up his accounts.

Nevertheless if the heir pretend to prove that the debtor acted fraudulently, or that he is due a balance, the release of the settlement of accounts shall not be extended so far, and the debtor cannot be exempted, for clearing these facts, from communicating his accounts to the heir, unless the testator had also expressly prohibited such inquiry.

§ 5.

A testator may free in whole or in part his debtor of what he owes him, and, for example, ordain his heir to exact but fifty rix-dollars of the hundred which he owes.

§ 6.

§ 6.

This legacy of release to a debtor may also be extended only to a certain time; for example, when the testator ordains that the one hundred rix-dollars which Caius owes cannot be demanded till two years after. The effect of this legacy is, that the heir cannot, till after that time, demand any interest, the legatary not being backward in payment.

§ 7.

A person may bequeath only a freedom from the debt, or else one may only exempt from payment the debtors personally.

Thus when the words import a release from the debt itself: for example, when the testator says, *The debt which Caius owes me is not to be exacted*, all the debt is extinguished.

But when the testator has exempted from payment only the debtor personally, for example, when he has said, *My heir shall not demand from Caius the debt which he owes me*; in this case the heir has still a right to raise an action against Caius's heirs.

§ 8.

When the testator has discharged the debt to one of the co-obligants, or joint obligants, the testator's heirs have still a right to require it from the other co-obligant: the case would be different, if the co-obligants were partners; for the legatary would not enjoy the advantage which the testator meant to give him, because the other co-obligant would have his recourse against him, by virtue of the partnership between them.

§ 9.

The debtor is justly freed by such a legacy; wherefore he has a right to raise against the heir an action *ex testamento*, to oblige him to give him an acquittance: he may also sue the heir in actions *ex lege diffamari*,

diffamari, et ex lege si contendat. If he be in possession of the legacy, he may get the heir cast, who prosecutes the payment of the debt, by objecting to him the exception of fraud.

§ 10.

When a testator has bequeathed to his debtor the pledge which he had from him, the debtor may redemand it before payment of the debt; if the heirs refuse to restore it to him, he may sue them in a claim of right, or in the action *condictio sine causa*; but the debt is not released by the legacy of the pledge, and may be exacted by the heir, when the time of payment comes. See above, § 3.

If the legatary not knowing that the testator has released him of what he owes, pay the debt to the heir, he may redemand it by the action *condictio indebiti*.

§ 11.

When the debt has been remitted to the debtor by a legacy of exemption, his sureties or cautioners are also thereby liberated from their engagement; so they have a right, when they are prosecuted by the heir, to object to him the objection of fraud; they are also entitled to raise the action *ex testamento*, to obtain a discharge, or to sue the heirs in the actions *ex lege diffamari, et ex lege si contendat*.

When the testator has freed only the sureties or cautioners, by prohibiting his heir to exact the debt from them, the principal obligation subsists, and the heirs may exact the debt from the principal debtor.

§ 12.

The legacy of release supposes that the legatary owes something to the testator; for if he owes him nothing, the legacy is null, and without effect.

§ 13.

§ 13.

In fine, we have shown above, [§ 3. and 4.] in what manner a testator may also bequeath to his creditor what he owes him; and it is sufficient to refer thither.

T I T L E VIII.

Of the legacy of option.

(De optione et electione legata.)

§ 1.

A Testator may leave a legacy to any one, by allowing him the choice or option among several things; for example, he may say, *Caius may chuse that particular horse, ox, or jewel of mine, or any piece of my silver plate, that he pleases.*

The option or choice is sometimes tacitly included in the legacy; for example, when the testator has bequeathed to any one a thing in general, (*genus*); see part II. book VIII. title II. § 18.

The difference of these two ways of bequeathing the choice consists in this, that, when the choice is expressly bequeathed, the legatary has a right to chuse what is best; whereas, when the choice is only given tacitly, he can require among several things of the same species only that which is a medium between the best and the worst. See *ibid.* § 18.

§ 2.

When a person shall bequeath to several legataries things of the same species, with the right of chusing, and they cannot agree about the choice, the question shall be decided by plurality of voices: if the voices be equal on both sides, they shall then cast lots to know

know which of the legataries is to keep the thing in dispute, with the burden of paying to the rest the valuation of the thing, proportionally to what part of it ought to fall to them.

§ 3.

The legatary is to make the choice himself, and not by a procurator: he cannot however be hindered from using the advice of any person to assist him.

§ 4.

The legacy of option is pure and simple, and does not include the condition; namely, *If the legatary make a choice*; for if he happen to die before the choice be made, he transmits his right to his heirs, and consequently the legacy is valid from the day that the testator died.

It is in this that the legacy of option differs from an agreement or covenant concerning the option, (*pactio optionis*), which takes place when, by a promise or by a covenant, a person has been allowed to make the choice; for the right of chusing arising from such a promise or covenant, affects the person in whose favour the promise was made; and consequently, if he do not chuse, he does not transmit the option to his heir.

§ 5.

The legatary ought, immediately after entering upon the inheritance, and as soon as he is acquainted with the legacy, to make his choice; if he do not make it, the heir shall petition the judge to fix a peremptory day for that purpose. If the legatary do not still make his choice within the space appointed by the judge, the heir may chuse, and give the legatary the worst of the things which the testator has left of the same species.

§ 6.

The legatary, after chusing, shall not be allowed a second choice, unless all the things of the same species have not been produced; even though that may have happened by chance, and without any fraudulent design on the part of the heir; in that case the legatary has the action of exhibition, (*ad exhibendum.*) The legatary may also chuse anew, when he has chosen a thing which he cannot keep, because it belongs to a stranger, &c.

When the question is concerning the choice of an immoveable subject, for example, of an acre of land, the heir is bound to give a particular account of all the acres, to describe their situation and limits, and to show them to the legatary.

§ 7.

If the testator have referred to a third party the choice of the thing left in legacy, and if the third party do not make the choice within the space assigned to him by the judge for that purpose, the legatary shall have a right to chuse.

T I T L E IX.

Of a legacy of land, or of a country-estate in general, or of a stocked farm or estate, that is to say, provided and furnished, or of the inventory of an estate.

(*De fundo, fundo instructo, et instrumento legato.*)

§ 1.

WHEN a testator bequeaths a land-estate or heritage in general, in that legacy is not included the inventory of the cattle, nor of the necessary

fary utensils for the culture of the grounds; far less is included the furniture on the farm or estate; there is nothing but what is fixed to the wall with nails and pegs included in it, as making a part of the estate or farm bequeathed, even when they have been taken away during the testator's life, with an intention to put them again in their place.

N. 1. In this legacy however are comprehended certain things destined for the perpetual use of the estate or farm; for example, the presses and vats in which wine is kept; and, if it be a garden, the boxes of iron, of lead, or of wood, in which are kept orange-trees, flowers, &c.

§ 2.

When a testator bequeaths a farm or country-estate in good condition, that is to say, provided or furnished, (*fundum instructum*), in this legacy is included, 1.) All the stock of cattle and necessary utensils for the culture of the grounds: 2.) All the things for the use of the farm; for example, the carts for carrying the hay, the ploughs, the harrows, the sledges or drays, the horses coverings or furniture, the servants beds, the vases or vessels for the provisions, &c.; even though these things were transported elsewhere for a time: 3.) All the furniture which the testator had there constantly for his own use; for example, the tables, though they were of marble, the beds of the owner and his family, the pictures, the books destined to remain in the country-estate, the wines in the cellar, the drugs and strong liquors used for remedies for the servants, and all the silver plate which the testator had there for his daily use; likewise the things which he had there for pleasure; for example, the furniture and utensils of hunting, the fishing-nets, &c.; likewise, all the provisions which he had laid up there for his own consumpt.

N. 1. The case would be different, if, for example, the testator had his wine there for sale; likewise, if he had laid up grain there to vend it, or if he kept his provisions there to use them in his family in town, and brought them thence from time to time for that purpose.

N. 2. Neither is the ready money, nor the jewels found in the country-house, included in this legacy.

N. 3. When a man has bequeathed an estate or farm, with all that is found in it, it is the same thing as if he had left in legacy the estate or farm, furnished and provided, (*fundum instructum*.)

§ 3.

When the farm or country-estate is bequeathed with the inventory, (*cum inventario*), in this legacy is included only the inventory of the cattle and things necessary for agriculture; that is to say, of the things which, according to the custom of the place, are reckoned to belong to the culture of lands; but in it are not comprehended the things which the testator has carried there for his own proper use, in which this legacy differs from the preceding.

§ 4.

When the testator bequeaths the inventory, (*instrumentum*), in this legacy is comprehended only what is requisite for agriculture; namely, the inventory of the cattle, and of the things necessary for the culture of the grounds; likewise, what is called *deputat*, the barley for beer, (*trinct perste*), harness, hay, straw, dung; bedsteads, servants beds, &c.; but in it is not included the farm, or estate itself.

§ 5.

Those legacies cease to have their effect, a) When the farm or estate happens to perish; or, b) When the testator alienates it in his lifetime; which takes place without

without any distinction, whether the farm or estate was bequeathed quite fitted up and furnished, (*fundus instructus*), or whether the inventory only was bequeathed with the farm or estate, &c; for when the farm or estate, which is the principal thing, happens to perish, the legatary has not a right to demand what is only its accessory, namely, the inventory.

T I T L E X.

Of the legacy which a testator leaves of his gold, of his silver plate, of his ready money, of his cloaths, of his jewels, and of the other things which he has for dress, &c.

(*De auro, argento, pecunia, mundo, ornamentis, vestimentis, &c. legatis.*)

§ 1.

WHEN a testator has bequeathed all his gold, and all his silver plate, in this legacy is comprehended all that the testator left, at his death, in silver plate and in gold, whether it be rough bullion, made into work or broken; neither is a distinction made whether it was lent, or if it be in the goldsmith's hand to be made into work.

N. 1. Herein consequently is included the service of silver plate, the side-board, all the coffee and tea plate, dressing-plate, branches, crowns, and lustres of silver, tables, frames, and andirons ornamented with silver, &c.

N. 2. If, for the ornament of any piece of silver or gold, jewels were set in it, or any pieces of money added to it, &c. they would, by virtue of the right of accession, be a part of the legacy, even though the things

things added might be separated from the things to which they are joined, without destroying their species, (*salva specie.*)

N. 3. In the general legacy of silver plate is also included gilded plate.

N. 4. But in it is not comprehended gold nor silver coined nor medals, nor pieces done over with silver, unless all these things have been expressly named by the testator.

§ 2.

When the testator has bequeathed only the silver made into work, and which can be used, in it is not included rough bullion, nor that which is broken.

If he have bequeathed only the pieces which he had for his daily use, therein will be comprehended only those which he used daily, with respect to which the declaration of the servants shall be taken.

§ 3.

When a testator has left in legacy the silver plate used at his table, in it shall be comprehended all that is required for furnishing or embellishing a table, and consequently the service of silver, if he have left one, the spoons, knives, forks, chafing-dishes, candlesticks, snuffers, great dishes, soup-dishes, plates or trenchers, tea and coffee equipage, and other like pieces of silver plate, but not the cisterns, cupboards, or sideboards, &c.

§ 4.

When the testator shall leave in legacy a certain quantity of silver, for example, ten marks weight, the heir shall pay its valuation to the legatary on the footing of the standard of the place.

§ 5.

When the testator shall bequeath all his ready money,

ney, neither the medals, nor the debts due to the defunct shall be included.

§ 6.

When a testator shall bequeath a kind of money or coin, whose value is liable to rise and fall, the heir shall pay the sum bequeathed on the footing of the value of that species, at the time of making the will.

§ 7.

When a testatrix shall bequeath her jewels, and all her dress, in that legacy shall be comprehended, 1.) All the jewels and all the precious stones which she has left, whatever name they may have, and whether they be set or not, even those which are actually in the jeweller's hand; 2) All the pieces of gold or silver, &c. which the defunct used in her dress; for example, gold necklaces, bracelets or pearls, girdles, buckles, &c.: 3.) Holy-day cloaths, with the laces used along with them, but not the linen. When the testatrix has left only her jewels, and not her dress, among them shall be comprehended only the precious stones, such as diamonds, rubies, &c. whether they be set or not; but among them shall not be included the other pieces which we have reckoned to belong to dress, nor the case in which the defunct kept her jewels.

§ 8.

When a testator has bequeathed his cloaths, among them shall be included all those which he left at the time of his decease, and in particular cloaks, riding-coats, furtouts, night-gowns, and other chamber-dress, short coats, night-vests, &c.

N. 1. In this kind of legacy is even included cloaths not yet finished, provided the cloth of them were already cut; for if it were entire, even though it were already in the tailor's hand, it would not belong to the

the legatary : herein are also included hats, stockings, shoe-buckles, but not the linen nor the sword.

N. 2. It is moreover of no importance whether those cloaths be sewed, woven, or knit.

§ 9.

When a testator shall order his heir to clothe the legatary, he shall be obliged to do so but once, and the cloathing shall be proportioned to the legatary's station : in this legacy shall be included the coat, vest, breeches, shoes, stockings, and hat, but not the linen nor the sword.

§ 10.

When a testator shall bequeath to any one a yearly cloathing, the heir shall be bound to give every year to the legatary such a complete suit ; if the testator had left him annually two suits, the one for summer and the other for winter, the heir must deliver to the legatary annually two such complete suits of cloathing.

§ 11.

When a testator shall leave his library in legacy, in it shall also be included the manuscripts, the geographical charts, maps, prints, and the presses for the books.

When the testator shall bequeath his pictures, in that legacy shall not be included the prints, family-portraits, nor the other pieces which are framed on the walls, in the wainscoting, and over chimneys.

§ 12.

When a testator shall bequeath the books of his trade, in that legacy shall be comprehended all the debts due to the testator which are posted in them, and which the testator has a right to require ; but by no means the money actually in cash at the time of his decease, though it be of new laid out to interest, or employed in trade.

T I T L E

T I T L E XI.

*Of a legacy of household furniture.**(De supellectile legata.)*

§ 1.

WHen a testator shall bequeath to any one his moveables, or furniture, thereby shall be understood all the moveable things which the testator had acquired for his own use and that of his family, without distinguishing whether he acquired them for necessary use or for his own pleasure.

N. 1. In this legacy shall also be comprehended the glasses, coronets, statues, canopies, sofas, pictures; likewise cups, spoons, forks, and knives of silver, which the testator used daily; but not the full services of silver plate, nor the cupboard, nor the sideboards, used only for ornament.

N. 2. In it shall also be included carpets, and tapestry or hangings, however valuable they may be.

N. 3. Likewise all the utensils and furniture of wood, such as tables, seats, benches, presses, and all that is usually comprehended, according to the custom of the place, under the name of household utensils and furniture; likewise coaches, chariots, earthenware, copper, tin, &c.; but not the testator's cloaths, his books, his arms, nor the presses used for these things.

N. 4. In this legacy shall not be included the ready money, nor the jewels, nor the animals which are in the house; for example, the horses, horned cattle, &c. nor the things which the testator has destined for the constant use of the house, and which do not belong consequently to the furniture, but to the house itself;

for example, water-engines, leather buckets, tuns, ladders, with which houses are provided, to be employed in the house in case of fire.

§ 2.

When a testator has bequeathed his house only, or lodging in a house, in that legacy shall not be included the furniture in it, unless that legacy were left by a husband to his wife: on the other side, lodging shall not be included in a legacy of the furniture.

§ 3.

When a testator has bequeathed a house with what is in it, in that legacy shall be comprehended the furniture in the house.

§ 4.

When the testator has left in legacy only the usufruct of his house, the legatary shall not have a right to claim the enjoyment of the furniture.

T I T L E XII.

Of the legacy of the stock of family-provisions.

(De penu legata.)

§ 1.

WHEN a testator has bequeathed his family-provisions, that legacy shall comprehend all that he had laid up for his own necessities, and that of his family, and consequently all the things used for eating and drinking.

§ 2.

Herein in particular shall be comprehended all that he had laid up in the buttery, or in the pantry; for example,

example, fleshes and fishes smoked, provisions of rye, pease, flour, oat-meal, &c. the plants and roots which are kept during the winter in the cellar; likewise what the testator had bought for his own use, of wine, beer, brandy; likewise wood, coals, candle; likewise the vessels in which those provisions are usually kept.

§ 3.

When a testator has several houses and estates, and has left in legacy in general his family-provisions, in that legacy shall be comprehended the provisions for eating and drinking, &c. which shall be found in each house, or in each estate or heritage.

§ 4.

But therein shall not be included the kitchen-utensils, nor those used for brewing and for baking, nor the things which the testator laid up for sale.

§ 5.

When a testator shall bequeath to any one his family-provisions, and shall allow him at the same time the alternative, either of taking the provisions or a certain sum in their place, the legatary shall be at freedom to demand the legacy either in kind or in money.

§ 6.

When a testator shall order his heir to deliver to the legatary the provisions, and if he be backward in doing so, to pay him a certain sum, the legatary shall not have a right to demand the sum till he have been obliged to prosecute the heir in a law-suit; in which case the latter shall no longer be at freedom to offer the provisions in kind.

T I T L E XIII.

Of legacies of grain, of wines, and of oil.

(De tritico, vino, oleo legato.)

§ 1.

IT happens sometimes that a testator bequeaths to a person grain, wine, and oil, and in this case the question is to know what he meant by such legacies.

§ 2.

In a legacy of grain (*tritico*) shall be included all the fruits of the ground.

When a testator shall bequeath in general to any one his grains, or his provisions of the fruits of the fields, in that legacy shall be comprehended all the fruits which have arisen, and are produced of the earth, and which shall exist at the time of the testator's decease, in particular pease, beans, buck-wheat, &c. likewise the fruits which the testator had laid up for sale.

Herein also shall be comprehended the meal or flour ground of the grain which grew on the testator's farm or estate; likewise the wheat or barley prepared for brewing, which is called in German *nialb*, the oatmeal, &c. and other sorts of provisions made of the different kinds of grains.

§ 3.

When a testator shall have determined the quantity and quality of the grain which he bequeaths to any person, his settlement must be complied with; for example, if he have left in legacy a wispel of wheat, of rye, of oats, of barley, &c. the heir must deliver to the

the legatary the quantity of wheat, &c. which the testator has marked; nevertheless, in this case it must be carefully distinguished whether the estate, or farm was added *taxationis gratia*, that is to say, to rate and value the legacy, or *demonstrationis gratia*, that is to say, to show in what place the quantity bequeathed is to be taken. See above, part II. book VIII. title II. § 19.

§ 4.

When a testator shall have marked the quantity which he wants to bequeath, it must be regulated in conformity to what he was accustomed to practise, and if it be, for example, a certain number of sheaves, they must be of the same length or thickness as those which the testator caused to be bound in his fields, and carried into his barns; if his practice in this respect be not known, the custom of the place shall be followed.

§ 5.

If the testator in determining the quantity have said nothing of the quality, it will depend on the heir to deliver the thing left in legacy of such quality as he pleases, provided it can be used in housekeeping.

N. 1. Thus when a testator shall bequeath a thousand rix-dollars, the heir shall have a right to pay them in six-fenning pieces.

N. 2. When the testator shall have left in legacy a tun of wine, the heir shall have paid the legacy by giving wine of the country-growth, unless the testator had in his cellar several tuns of foreign wine, in which case the heir shall be bound to deliver a tun of wine out of the cellar.

N. 3. When the testator shall bequeath to any one a wispel of wheat, of oats, or of rye, &c. the heir shall not be bound to give of the best, but it shall be sufficient if it can be used in a family.

§ 6.

§ 6.

When a testator shall bequeath his wine in general, in that legacy shall be included all that he used to call by that name, and consequently not only the wine of the growth of his own vineyard, but also all the foreign wines which belong to him; likewise the made wines which go under the name of wine, for example, mead, cowslip wine, as also the wines which are soured, but not those which are changed into vinegar, nor those which the testator destined and used for making of vinegar.

N. 1. When the testator has bequeathed, for example, ten barrels of wine, and has no other in his cellar but pricked or spoiled wine, the legatary shall be obliged to take of that.

N. 2. In a legacy of wine shall be included the casks in which it is usual to sell it, and which are accessories of the wine. The case would be otherwise if the wine were in great vats or vessels, whence it was to be drawn to be put in casks; for those vats are immoveable things, destined constantly for the use of the cellar; which shall likewise be observed though the testator should have bequeathed the wine with the casks in which it is contained.

When a testator shall bequeath the wine without the casks, the legatary shall be bound to provide casks for himself.

§ 7.

When a testator shall leave his wine in legacy, and it shall be found that he has none in his cellar, nor elsewhere, the legacy shall not be valid.

§ 8.

When a testator shall bequeath a quantity of new wine, the heir shall not have a right to give to the legatary, contrary to his inclination, wine which is old.

§ 9.

§ 9.

When a testator shall bequeath all his old wines, in that legacy shall be included all the wines excepting those of the last year.

When a testator shall bequeath a certain quantity of his old wines, and shall have them of different qualities, the heir shall be bound to give only of that which is a medium between the best and the worst.

When a testator shall have bequeathed a cask of wine, and shall have several in his cellar, the case shall be the same as in the legacy of a certain species, or of a certain kind, of which we have already treated, (*de legato generis.*)

§ 10.

When the wine left in legacy perishes, or is pricked and spoiled, the legacy ceases to have its effect, unless it had perished, or was spoiled through the heir's fault; for though usually in such a case the debtor ought before the payment to take upon himself the risk of the quantity which he owes, which cannot perish, nevertheless this rule admits an exception in the present case: the reason of which is, that a quantity to be taken out of a certain stock, or out of a certain place, is entirely alike to an individual.

§ 11.

The Roman laws have occasioned several doubts concerning a legacy of oils; but as those difficulties can hardly be formed but in Italy, where the greatest trade in oil is, we think it sufficient to decree here in general, that when oil shall be left in legacy, that legacy must be understood of all the oil that can be used, either for eating or for burning, and consequently of fish or train oil, lintseed oil, oil of nuts and almonds, &c.

When

When a testator shall bequeath oil in general, or a certain quantity of oil, without specifying the quality, it shall depend on the heir to give oil used in eating, or only oil for burning.

T I T L E XIV.

Of the legacy of maintenance or alimony, and of that of food.

(De alimentis et cibariis legatis.)

§ 1.

THE laws favour in a very particular manner legacies of maintenance, or of alimony, (*alimentorum*), and for that reason it has been usual to interpret that kind of legacies as favourably as is possible.

§ 2.

Neither that kind of legacies, nor any other can be made but in a valid will, and one executed with all the solemnities requisite; so that when a will is annulled, the legacy of alimony falls also, and would be invalid, though it had been left in favour of a pious community.

When the will is not annulled, and is only invalidated with respect to the nomination of heir, all the legacies are valid, and consequently also the legacy of alimony.

§ 3.

The legacy of alimony may be left even to those who otherwise are incapable of receiving by will; for example, 1.) To those who are proscribed, unless they be guilty of the crime of high treason, (*perduellionis rei*); 2.) To children born in adultery or in incest; and, 3.) To the children born of a prostitute.

N. 1.

N. 1. When a man shall bequeath to this kind of persons a sum above their necessities and their station, the legacy shall be moderated to just bounds by the authority of the judge, who shall decree to them only what is indispensably necessary for their maintenance: the reason of which is, that it is presumed the testator intended indirectly, and to elude the law, to make them sharers of the succession.

N. 2. When a testator has bequeathed alimony to his bastard, to be enjoyed till he arrive at the age of puberty, if he happen to die before that age, the mother shall not have a right to demand the alimony for the years which the bastard might still have claimed it if he had lived. The reason of which is, that that legacy was appropriated only to the bastard personally.

§ 4.

When a testator shall leave in legacy alimony to the legatary and his children, the heir shall be bound to furnish it to the legatary's children who shall be born afterward; which is not to be understood of adopted children, were they even assumed or adopted by an ascendant, and still less of bastards.

§ 5.

When a testator shall bequeath an alimony to his wife, and she shall die before him, if he happen to leave at his death a second wife, the legacy shall be due to her, and the heir shall be bound to deliver to her the thing bequeathed.

§ 6.

The testator may leave a legacy of alimony in different ways; for example, 1.) He may bequeath to the legatary once for all, either a capital sum, or an estate or farm, to be used for his maintenance; 2.) Or he may allot to him a sum to be drawn annually or

monthly; 3.) Or he may bequeath to him in general his entertainment or maintenance, without specifying the sum, or determining the time; 4.) He may also allot the lands or subject whence the legatary may draw his alimony; in fine, 5.) A capital sum may be left in legacy to one person, to be employed in the entertainment and maintenance of a third party.

§ 7.

When a testator shall bequeath to the legatary a capital sum, or an estate or farm, for his maintenance, this legacy is pure and simple; wherefore the legatary shall have a right to require the whole capital after the testator's death, and if he happen to die before opening of the will, he transmits his right to his heirs: as to the land estate or farm bequeathed for the maintenance of the legatary, he acquires the property of it by law, (*ipso jure*); and both he and his heirs are entitled to claim it from all those who are in possession of it, consequently this legacy is not properly a legacy of alimony.

This rule admits an exception, when a father bequeaths to his bastard a land-estate or farm for his maintenance; for, in this case, only the incomes of the estate shall be delivered to the bastard.

§ 8.

When a testator has bequeathed to a legatary a certain sum for his maintenance, and when that sum is to be paid yearly, monthly, or weekly, these are several legacies, of which that of the first year, of the first month, or of the first week, only is a pure and simple legacy; so that the legatary happening to die in the first year, transmits to his heirs only the alimony of that year, &c. As to the legacy of the years, of the months, or of the weeks, into which a legatary is not yet entered, they are all reckoned as left on this condition; namely, if the legatary be then

then in life : thus, when he happens to die, the legacies of the years into which he has not yet entered, are extinguished, and cannot be transmitted to his heirs : we have already fully treated of this subject in title III.

§ 9.

When a testator has not determined the quantity which is to be employed for the maintenance of the legatary, and when the legacy of alimony or maintenance is left in general, this case is liable to more difficulty.

To determine it, 1.) We decree and establish, as a general rule, that the heir shall furnish to the legatary every thing requisite for his maintenance.

Nevertheless, 2.) It shall also be taken into consideration, a) What the testator used in his lifetime to do in favour of the legatary ; and, b) If it be not known what he did in his favour, or if he gave him nothing in his lifetime, regard must be had both to what is necessary for the legatary, according to his station, and to the quantity of effects which the testator leaves ; or, c) Regard shall be had to what is necessary for the maintenance of a person in the place where the legatary is settled ; d) The legatary's age must also be considered, and what shall be assigned for his maintenance is to be augmented or diminished accordingly.

3.) When a father has bequeathed an alimony to his daughter whom he has disinherited, he must settle for her maintenance a sum proportioned to the portion which he has given to his other daughters, or which he was bound to settle in their favour in proportion to his fortune.

4.) In the general legacy of alimony is included, besides meat and drink, cloathing and lodging, proportioned to the legatary's quality, but not an equipage or horses : if the legatary have a family, it must

also be maintained according to his station, unless the testator have expressly excluded it.

5.) In the legacy of alimony shall not be included what the legatary is obliged to expend for his education or travels, nor the charges of interment, unless the testator have expressly mentioned them.

6.) When the testator, in bequeathing alimony, has not determined a certain time, the legacy shall be due to the legatary all the days of his life.

When the legacy of alimony is left to the legatary to continue till he have attained the age of puberty, not only is full puberty, being eighteen years of age, understood thereby, but also the time is reckoned from one instant to another, (*de momento in momentum*), and consequently this legacy ends only at the last hour of the eighteenth year.

§ 10.

When a testator has left in legacy a certain sum or quantity for the maintenance of the legatary, and has mentioned the stock or estate whence that sum or quantity is to be taken, a distinction must be made, whether the stock or estate was added *taxationis gratia*; that is to say, to rate and value the legacy, or if the testator mentioned it only *demonstrationis gratia*, that is to say, to show out of what place the quantity bequeathed is to be taken: in the first case, the legatary shall be obliged to satisfy himself with the product of the estate or stock, and, in the second, he may demand what is wanting of the sum or quantity bequeathed. See part II. book VIII. title II. § 19.

§ 11.

When the testator shall order, at the same time, that the legatary have the administration of the estate, or stock, the heir may oblige him to give security, that he will preserve the estate or stock, and will not waste

waste or destroy it, and this security may be given in this case by oath, (*jurato.*)

If, after giving juratory security, the legatary; nevertheless, can be convicted of wasting or destroying the estate, the judge, taking cognisance of it, shall take care to order a sequestration of the estate, or to let it in lease; and the legatary shall receive from it what is sufficient for his maintenance.

§ 12.

The heir or his substitute, if the first do not incline to be heir, shall be bound to furnish to the legatary entertainment and alimony after the time of the testator's decease.

When the heir avails himself of the space for deliberation whether he will accept the succession, and when there is a testamentary executor, the latter shall furnish, in the mean time, maintenance to the legatary.

If there be no testamentary executor, the judge shall cause the maintenance to be furnished by a curator or trustee for the succession, whom he shall establish for that purpose.

§ 13.

The heirs are bound to pay the legacy in the manner and on the footing ordered in the will.

Thus, when a testator has bequeathed to any one, for example, two wispels of rye for his maintenance, the legatary is not bound to accept, in place of the rye, the current market-price, nor is the heir bound to pay the rye in money; which shall be observed without allowing any exception to the contrary.

§ 14.

Those legacies shall also be paid, without being subjected to any burden; for example, to excise, toll, postage,

postage, &c. nor to the deduction of the debts due by the testator.

§ 15.

The exchequer, when a succession falls to it, is bound to fulfil all the engagements which are imposed on heirs.

§ 16.

The heir is also obliged to furnish the alimony at the time prescribed by the testator. Thus, when a testator has allotted for the maintenance of a legatary a certain sum or quantity, which is to be delivered yearly, monthly, or weekly, the heir must begin to pay the legacy from the day of the testator's decease, and must continue to furnish maintenance to the legatary at every new year, at every new month, or at every new week.

This rule admits an exception, 1.) When the testator has determined the time at which the legacy is to be paid; which, 2.) May be done indirectly; for example, when the testator allots the fruits of certain laboured grounds for the maintenance of the legatary. For, in this case, the grains which grow are delivered to the legatary all at once, and can be delivered to him only at the time of harvest. Nevertheless, if he be an idiot, or a prodigal, and it be consequently to be dreaded that he may squander all at once, and that nothing may remain for his future maintenance, the heir shall not deliver to him the whole legacy at a time, but he shall take, with the approbation of the judge, certain measures, in virtue of which he shall deliver to him only by parcels what he owes for his maintenance, that he may have whereon to subsist during the whole year, or the whole month, in which he is to receive alimony.

§ 17.

The legacy of alimony enjoys several privileges;
for

for example, 1.) The legatary has not a right to transact with the heir concerning the legacy of alimony, unless the transaction be made judicially, and unless the judge take previous cognisance of it, and allow them to treat of it together, (*cum causæ cognitione et prævio decreto.*)

2.) When a father has bequeathed alimony to his bastard, if the mother make an agreement on that head, in the name of her child, with the heirs, that agreement shall infer no prejudice to the bastard; and the heir shall be bound to furnish him alimony from the moment that his mother died, or that she ceased to maintain him. In this last case, the heirs are to take their recourse against the mother.

3.) The legacies of alimony which a testator leaves to his wife, to his relations, and even to a third party, cannot be seized by the legatary's creditors, whoever they be.

4.) The heir who has made advances to the legatary for the years to come, has not a right to object to him the exception of compensation in consequence of those advances.

5.) If any difference arise concerning the alimony, the appeals against the sentence which shall pass concerning those differences, shall have no other effect than what is called in law devolution, (*quoad effectum devolutivum.*)

§ 18.

The legatary, to whom alimony is bequeathed, acquires, 1.) By virtue of that legacy, the personal action *ex testamento*. See part II. book VIII. title II.

§ 55.

2.) If the alimony be allotted on a certain subject, the legatary acquires a tacit hypothec or mortgage on that estate or subject.

3.) When the estate itself is bequeathed and assigned to the legatary, to draw his maintenance out of it,

it, he shall have a claim of right with respect to that subject or estate. See above, § 7.

§ 19.

The legacy of alimony expires, 1.) When the legatary happens to die; and, if it be an annual legacy, when the legatary has not begun the year. See above, § 8. Moreover, the question is here only of natural death; for civil death does not extinguish the legacy, unless it be a consequence of the crime of high treason. The legacy does not expire by the death of the heir, and his heirs are bound to continue to furnish maintenance to the legatary on the same footing.

2.) This legacy of alimony comes to an end, in the second place, by prescription. When it is an annual legacy, there must be a new prescription for every year. See part II. book VIII. title III. § 9.

The legacies in which fathers and mothers are bound to their children, or the children to their fathers and mothers, can never be prescribed. The reason of which is, that it is an obligation which nature itself imposes on them.

3.) The legacy of alimony expires, in the third place, when it was left only for a certain number of years, and that time is elapsed; for example, when it was left to continue only till the legatary have attained the age of puberty, it expires when the legatary attains that age.

§ 20.

A difference is made between the legacy of alimony and that by which a testator bequeaths to any one only food or board, (*diaria et cibaria*;) for in this last legacy is included only what is necessary for the legatary for meat and drink, and neither cloathing nor lodging is comprehended.

TITLE XV.

Of the legacy of a peculiar.
(*De peculio legato.*)

§ 1.

WHEN a testator shall bequeath to his children their camp, supposed camp, and adventitious peculiars, or shall leave to one of his children the peculiar of another child, in such case shall be observed what has been decreed concerning the legacy of a thing belonging to the legatary himself, or even to another, (*in legato rei propria et alienæ.*) See part II. book VIII. title II. § 27. and *ibid.* § 31.

§ 2.

When the father shall bequeath to his son the profectitious peculiar, in it shall be included all that the peculiar increased in the father's lifetime.

N. 1. If it happen that this peculiar receives any accretion after the father's death, and before entering upon the inheritance, the son shall reap the advantage of it, and on that account regard is had to the day of the entry upon the inheritance, (*attenditur dies aditæ hereditatis.*)

The case would be otherwise, if the father had given the peculiar, not to the son who had the administration of it, but to another of his children; the legatary, in this case, would not profit by the accretion, but regard would be had to the day of the testator's decease, and all that was not a part of the peculiar before his death, would not fall to the legatary, unless the accretion arose from the very things belonging to the peculiar.

T I T L E XVI.

Of the conditions, and descriptions, likewise of the causes and motives, or burdens, which testators may annex to legacies.

§ 1.

A Testator may not only, 1.) Impose conditions on the legatary, but he may also, 2.) Point out and describe the legacy; which lawyers call *demonstrationem*. He may also, 3.) Declare the cause or motive which has induced him to leave the legacy; in fine, he may 4.) Add to his settlement a certain manner of enjoying the legacy which is called in law *modus*; that is to say, impose certain engagements, or certain things on the legatary, which show the aim which he proposes to himself in leaving the legacy. We shall treat of these clauses in this title.

§ 2.

1.) We have already shown above, book VII. title XIII. what is to be understood by a condition, and that it is casual, in one's power, or mixed.

N. 1. We have there, moreover, shown, that necessary and scandalous conditions have not the effect of conditions; for a legacy, left under a necessary condition, is reckoned pure and simple, and that which is made on a scandalous condition is null; as to conditions prejudicial to good manners, they are reckoned as if they had not been inserted in the settlement.

N. 2. We have also treated of the manner of fulfilling conditions, and shown when they may be reckoned as fulfilled.

N. 3.

N. 3. Moreover, what has been decreed concerning conditions annexed to the nomination of an heir, is also applicable to conditions annexed to legacies. The case must be excepted, in which it has been enacted that the necessary heirs cannot be nominated under a casual and mixed condition.

§ 3.

When a testator has bequeathed any thing on a certain condition, the heir is not bound to pay the legacy till the condition exist.

When it is a condition which the legatary is to perform, and which consists in doing a thing, the condition does not exist till the legatary has done, after the testator's death, the thing with which he is burdened, and it would not be sufficient that he had done it before, unless it appeared that the testator's intention was thereby fully performed; we have given examples above, part II. book VII. title XIII. § 11.

The condition which imposes the obligation of not doing a thing, exists, when the person on whom it is imposed is put out of a state of contravening the condition. See *ibid.* § 11.

§ 4.

II.) It often happens that a testator points out and describes the thing bequeathed with its qualities, or adds, on naming the legatary, certain circumstances, concerning his name and his station, which gives occasion to debate the question; namely, whether the legacy be invalid, when the testator has mistaken in making such descriptions, additions, or designations?

We lay it down as a general rule, that a false designation, addition, or description, shall not render the legacy invalid, provided the testator's intention be evident.

Thus when a testator shall leave a legacy to Caius, calling him by mistake his cousin, or giving him a title or surname which he has not, &c. the heir can-

not make a difficulty to pay the legacy, provided Caius's person be known, and that it be certain the legacy was made in his favour: neither shall the heir be allowed to raise a law-suit against Caius, on pretext that the testator would have left him no legacy if he had known his mistake.

§ 5.

Legacies may be left, a) At a day, or against a day, of which it is uncertain whether it shall exist, (*sub die incerto an sit exstiturus*), or at a day, of which it is certain that it shall exist, though it be not known when it shall exist, (*sub die certo quod sit exstiturus, etsi incerto quando sit exstiturus*), or legacies may be left to take place reckoning from a certain day, (*ex die*), or to continue only till a certain day, (*in diem*.) All those legacies are pure and simple, excepting when it is uncertain whether the day shall exist, (*an sit exstiturus*;) in which case, the legacy is conditional, and there is a necessity to wait till the condition happen. See above, part II. book VII. title XIII. § 4.

§ 6.

When a testator has bequeathed a certain thing, and has committed some mistake in describing it, for example, if he have left in legacy his year-old horse, and has none of that age, the legacy shall nevertheless be valid, and the heir shall be bound, if the testator have left several horses, to give to the legatary that one whose age is nearest the age of the horse bequeathed; if the testator have left but one horse, he must be delivered to the legatary, even though he were ten years old. The case would be the same when the testator shall bequeath to any one the ox which he bought from Caius, though he never have bought one from Caius: for in this case the heir shall be bound, notwithstanding the mistake committed in the description, to deliver another ox to the legatary,

tary, but he shall have a right to chuse one for that purpose out of those which the testator has left, which may be neither of the best nor of the worst.

§ 7.

When a testator has not bequeathed a certain thing, but a quantity, and has committed a mistake in the sum, the legacy shall subsist either in whole, or only in part. It shall subsist in whole, when it shall appear that the testator has added to the sum bequeathed an estate, or a strong box only, *demonstrationis gratia*, that is to say, to show out of what place the sum bequeathed is to be taken; but the legacy shall subsist only in part, when it shall appear that the testator added the estate or strong box *taxationis gratia*, that is to say, to rate and value the legacy. See above, part II. book VIII. tit. II. § 19.

The case shall be the same, when the testator shall leave to Caius fifty rix-dollars out of the hundred which he bequeathed to Mævius: the legacy shall be due to Caius, though the testator have not bequeathed a hundred rix-dollars to Mævius, and the latter shall not be intitled to demand the hundred rix-dollars, because, with respect to him, it is the legacy itself that is false, and not the description.

§ 8.

III.) A testator frequently adds to his settlement the cause or motive which has engaged him to leave a legacy to the legatary, and shows what occasioned it.

If the cause which the testator alleges be false, the legacy is not thereby annulled, because regard is had only to the testator's principal intention, which was to do something advantageous to the legatary.

Thus when a testator bequeaths a hundred rix-dollars to Caius, because Caius saved his life, or did him
many

many services, the heir is bound to pay him the hundred rix-dollars, though the cause or motive of the settlement be not well founded : neither shall it be examined whether the testator would have left the legacy in case he had known his mistake.

N. 1. As the legacy subsists though it be granted from a motive not founded on truth, the legacy is also invalidated, though the cause or motive which the testator alleges for revoking it have no foundation.

Thus when the testator having bequeathed a hundred rix-dollars to Caius, afterwards revokes the legacy, and alleges as a motive of the revocation the adultery committed by Caius, the legacy is thereby annulled, though it be publicly notorious that Caius is innocent of that crime.

§ 9.

IV.) In fine, the testator may annex to the legacy a certain manner (*modum*) of enjoying it ; that is to say, impose certain engagements or certain burdens on a legatary in consideration of the legacy.

This manner of bequeathing differs from conditions ; for a conditional legacy cannot be required unless the condition exist ; whereas a legacy left *sub modo* is a pure and simple legacy, which may be demanded by the legatary before he has performed the engagement imposed upon him by the testator, considering the legacy is to be useful for fulfilling the engagement.

§ 10.

If there be any doubt about the nature of such a legacy, it shall be reckoned conditional, when the testator has used the adverb *when*, because in that case the settlement remains suspended till a future event ; but the legacy shall be reckoned as left *sub modo*, when the testator shall use the words *for, in order,*

der, to the end that; for example, when he shall bequeath a thousand rix-dollars to any one, *in order* to buy an heritage with it, *for* building a tomb with it, or to the end that a portion may be settled out of it to his daughter.

§ 11.

A legacy left *sub modo* may be demanded immediately after the testator's death, and the heir is bound to pay it before the legatary can be obliged to fulfil the engagements under which he is laid.

But if the heir be afraid that the legatary may not fulfil the engagement, or that he may too long postpone the fulfilling it, he may require him to give surety that he will perform it within a certain space.

§ 12.

It is easily understood that this security can be required, 1.) Only when the engagement is imposed in favour of the testator; for example, when he has left the legacy with the burden of building a tomb for him; or, 2.) When a third party is concerned in it, and he solicits to get the legatary obliged to give security; for example, when the testator has bequeathed a thousand rix-dollars to the legatary in order to settle out of it a portion in favour of the legatary's daughter; or, 3.) When the heir himself has an interest in it; for example, when the legacy is to return to him in case the legatary do not perform the engagement.

But if the engagement be solely for the legatary's advantage, it is not necessary that he give security; as when, for example, a legacy may be left him of a thousand rix-dollars to buy an employment or an estate, &c.

§ 13.

When the legatary does not perform the engagement in which others are concerned within the space prescribed,

prescribed, it depends on the heir to sue the legatary in an action *ex testamento*, to oblige him to fulfil the engagement, or to resume the legacy, and to fulfil the engagement himself.

§ 14.

A legacy left *sub modo*, being pure and simple, is transmitted to the legatary's heirs, in which it differs from a conditional legacy, which acquires no force but from the date on which the condition exists. Thus when the legatary dies before the existence of the condition, his heirs have no right to demand the legacy, as the legatary has no power to transmit to his heirs a right which he himself had not yet acquired.

When the engagement which the testator has imposed concerns a thing impossible to be executed; for example, when the testator has bequeathed to any one a thousand rix-dollars for building a castle in the air; or when the engagement infers a *turpitude*, for example, when the testator has bequeathed to any one a thousand rix-dollars for keeping a mistress, these sort of clauses are null as well as the legacy. But if the engagement be contrary to good manners, the legacy is nevertheless valid; the reason of which is, that the clause which binds to actions contrary to good manners is regarded as if it had not been inserted in the settlement; whence it follows, that if the testator bequeaths a thousand rix-dollars to any one for changing his religion, the legatary is not bound to execute that clause, which is reckoned as if not inserted in the settlement.

§ 15.

When the testator has bequeathed a thousand rix-dollars to Caius that he may marry Titius's daughter, and when she refuses to marry him, the legacy subsists,

sists, because it does not depend upon the legatary to fulfil the testator's will.

When the testator, after having bequeathed a hundred rix-dollars to Caius on condition of bearing his name, afterwards bequeaths the hundred rix-dollars to Seius on the same condition, the legacy is reckoned revoked with regard to Caius, and transferred to Seius.

T I T L E XVII.

Of the day on which a legacy becomes due to the legatary.

(Quando dies legati cedat.)

§ 1.

AFTER having treated in general of legacies, we must now show when and from what day the legatary acquires a right to the legacy.

§ 2.

When the testator has bequeathed a thing purely and simply; for example, if he said, *I bequeath a hundred rix-dollars to Caius*, the legatary acquires a right in the legacy from the day of the testator's decease; which would take place even though the legatary should happen to die before the opening of the will, or before the heir had accepted the succession.

The legatary transmits also his right to his heirs.

This rule admits an exception, when the testator has bequeathed to any one a personal right affecting only the legatary's person; for example, if he have bequeathed to him a personal servitude, namely, one of usufruct, use, or inhabitation; likewise, when a testator has bequeathed to any one a choice or option. In this case the legatary acquires no

right in the legacy till the heir have accepted the succession. So when the legatary happens to die before the entry of the heir, he does not transmit the legacy to his heirs.

N. 1. If the legatary die before the heir, the legacy is at an end, and consequently also the condition.

§ 3.

A legacy is pure and simple, when it is left to take place from a certain day, (*ex die*); for example, when the testator has bequeathed to any one a hundred rix-dollars to be paid to him six months after the testator's death; likewise, when the legacy is to have its effect only till a certain day, (*ad diem*); for example, when the testator bequeaths to Caius the enjoyment of his vineyard for a year.

In these two cases the legatary acquires a right from the day of the testator's decease, and he transmits consequently his right to his heirs; nevertheless, in the first case the heir is not bound to pay the legacy till the time appointed by the testator be come.

§ 4.

When a testator has left to any person a legacy on a condition, the legatary acquires a right in the legacy only from the time that the condition exists: if he happen to die before, the legacy is extinguished, and the legatary's heirs have not a right to demand it.

The case is different, 1.) When the condition is superfluous and unnecessary; for example, when the testator appointing Caius for his heir, bequeaths a hundred rix-dollars to Seius, in case Caius be heir; for in that case the legacy is pure and simple.

2.) When the condition annexed to the legacy is impossible or scandalous, (*turpis*); for in that case the whole legacy is null.

3.) When the condition is contrary to good manners,

ners, it is regarded as not inserted in the settlement, and therefore the legacy is also pure and simple.

4.) When any legacy shall be left either to Us, or to a body corporate, or to a community, these legacies shall be reckoned pure and simple, because in these two cases the death of the legataries does not destroy the legacy left to the sovereign or community, and because consequently the condition cannot fail.

5.) In fine, a legacy is pure and simple when the condition is a consequence of the nature of the legacy; for example, when a man bequeaths the fruits which shall grow in a farm or estate; or when the conditions are among those which the laws themselves suppose: that kind of settlements being pure and simple, acquire a force from the day of the testator's decease, and the legatary transmits his right to his heirs.

§ 5.

It is reckoned as a condition, when a testator annexes to his settlement a day of which it is uncertain whether it shall exist. Thus when a testator bequeaths to any one a hundred rix-dollars, to be paid when he shall attain the age of puberty, this legacy is conditional, because the legatary may die before the age of puberty, and because it is consequently uncertain whether he shall arrive at that day.

But it is not a condition when it is certain that the day shall happen, though it be uncertain when it shall exist; for example, when a testator bequeaths a hundred rix-dollars to Caius, to be paid when Seius shall happen to die, that legacy is pure and simple; for it is certain Seius shall die, and that consequently the condition shall exist, though it be not known when the death of Seius shall happen.

§ 6.

When a testator leaves to the same legatary one legacy pure and simple, and another conditional, if it happen that the legatary come to die before fulfilling the condition, his heirs can demand only the pure and simple legacy, and not that which is conditional: the reason of which is, that the legatary has acquired by the testator's death a real right only to the first legacy which he transmits to his heirs.

When the legacy is left to continue only till a certain time, (*ad diem*), if in the mean time the legatary's effects be confiscated, the exchequer shall have a right to enjoy the legacy till the time prescribed by the testator; but when that time comes, the exchequer shall be bound to restore the thing left in legacy, but cannot however be obliged to give security on that head. The same shall be the practice when a testator has left a legacy on condition, (*sub modo*), that the legatary shall do something.

When a legacy is single and simple, (*unum et simplex*), it has its effect all at once; that is to say, the legatary acquires all at once a right in the whole legacy. But when there are several legacies, as happens in annual legacies, (*in legatis annuis*), each year brings on a new legacy, and the legatary acquires at every new year a new right; wherefore he transmits to his heirs only the right of every year into which he has entered.

T I T L E XVIII.

Of the security which the heir is bound to give on account of the legacies.

(Ut legatorum nomine caveatur.)

§ 1.

FROM the preceding titles it results, that legacies sometimes happen not to be due immediately, namely, 1.) When the testator has annexed a condition, the existence of which is to be expected. 2.) When the testator having prescribed a certain term at which the legacy is to be paid, that term is not yet come. 3.) When it is a pure and simple legacy with respect to which two legataries are at law.

§ 2.

As it is entirely equitable that in the mean time the legatary should be secured, the laws, in order to prevent the legacy from becoming ineffectual in the sequel, have allowed the legatary a tacit hypothec or mortgage on all the heir's effects.

§ 3.

But when the legatary does not believe his right of tacit hypothec or mortgage to be a sufficient security, he is at liberty to demand a particular surety, in which case he loses the tacit hypothec or mortgage.

§ 4.

All the heirs, as well as those who succeed to their effects, are bound to give this security, whether they be testamentary heirs or heirs intestate, or at law, rich or poor, even those who have estates, or against whom there is not room for the least suspicion of their being insolvent.

insolvent. If there be several heirs, each is bound to give security only proportionally to the share which he has in the succession.

§ 5.

The security is to be given by bondsmen or sureties, or by pledges, and juratory security shall be admitted.

§ 6.

The security which the heirs are bound to give to the legataries above mentioned, is to be demanded before litigation.

But the legataries must previously prove, a) That they are legataries, and, b) That the heir from whom they are to require the security has accepted the succession.

* When there are several legataries, and there are two of them at law about the legacy, the security shall be given to both.

§ 7.

The security which the heir is to give, consists in ascertaining the legatary that he will pay the legacy, and will fairly deliver the thing bequeathed, when the condition shall happen to exist, or when the day on which the delivery should be made shall come.

* When two legataries are at law concerning the legacy, the heir is not to give security till the end of the law-suit, he shall then deliver the legacy to the person who has gained the cause.

§ 8.

Moreover, it is sufficient, if the security by a bondsman or surety, &c. be once given and accepted, and a person cannot, on pretext, for example, that the guaranty is poor, demand another surety. The case would however be different, 1.) If the surety, after giving his security, happened to suffer any great loss,

* There seems to be an inconsistency in these two paragraphs.

or

or to squander his effects, or to become suspected of an intention to run away; and, 2.) If the pledge given in warranty, happened to be lost by any accident.

§ 9.

The heir is not bound to give security, 1.) When the testator, in his will, has discharged him from doing so.

2.) When it is the exchequer and a body corporate, or a community who are to pay the legacy, from whom only a declaration or promise in writing to fulfil the settlement can be demanded.

3.) When the security is superfluous and unnecessary; for example, when the heir wants to prove immediately that the legacy or trust-deed is null, and that he is not bound to pay it.

If, in this case, the heir be cast in the first instance in that proof, he shall be bound to give security, even though he had appealed against the sentence by which he was cast.

4.) When the legatary has not demanded the security before litigation; see above, § 6.

§ 10.

It depends upon the legatary to demand the security, before the judge of the place of the testator's residence, or before the judge of the place where the heir entered.

§ 11.

The legatary acquires, by virtue of this action, 1.) The action *ex fidejussu*, when the security is given by a bondsman, surety, or cautioner, 2.) The action called *pignoritiam et hypothecariam*, when the legatary has taken a pledge for his security.

§ 12.

When the heir will not give security within the space prescribed, and, when it is by his fault, he shall

shall not afterwaad be allowed to give it; but the legatary shall be put in possession of the whole succession, such as the heir has received it from the testator, and, consequently, also of the subjects of the succession, which, by the fraud or by the great negligence of the heir, have been purloined from it.

N. 1. This seizure shall not be made of the heir's own effects, unless he have also given security six months after the seizure, (*a die immissionis*), in which case it shall be made also of his own proper effects.

N. 2. When there are several legataries, and a seizure is obtained, it does not turn to the advantage of the rest; in which a seizure, made on account of a legatary, differs from that which is made on account of a creditor. But when, afterward, all the other legataries obtain a seizure, the first has no right of preference, and they have all an equal right.

N. 3. The legatary acquires, by this seizure, only the right of possessing the succession jointly with the heir, and of having, for that purpose, an apartment in the house in which the effects of the succession are, which he may occupy himself, or cause it to be occupied by another; but he cannot dispossess the heir, nor assume the administration of the possession, unless the heir squander it, or alienate the effects of it, &c. In this case the judge, after taking cognisance of the matter, shall take the administration from the heir, and give it to the legatary, or he shall set in farm the subject bequeathed, or else he shall sequester it; and the heir cannot, by appealing against such judgment, obtain a suspension of the effect of the sequestration.

When the day on which the legacy ought to be paid is come, they shall immediately proceed by way of execution.

T I T L E XIX.

Of the different methods of annulling and invalidating legacies.

§ I.

A Legacy may be annulled and rendered ineffectual in different ways; namely, 1.) When the testator takes from the legatary the legacy which he has left him, and revokes it, (*de adimendis et transfereendis legatis.*) See art. I.

2.) When the legacy falls of itself, (*corrui.*) See art. II.

3.) When the testator has expressed himself, in making the legacy, in a manner so obscure and doubtful, that one cannot, by a rational interpretation, come to know what was his intention, (*de rebus dubiis.*) See art. III.

4.) When the legacy is null originally, even though the fault which annulled it, should happen afterward to cease, (*de regula Catoniana.*) See art. IV.

5.) When the legacies are reckoned as if they had not been left, (*de his quæ pro non scriptis habentur.*) See art. V.

6.) When the legacy is taken from the legatary, because he has rendered himself unworthy of it, (*de his quæ ut indignis auferuntur.*) See art. VI.

7.) When the testator has been mistaken in the person of the legatary, or in the thing bequeathed. See art. VII.

A R T. I.

Of the method of annulling the legacy by revoking it.

§ 2.

WHEN a testator, after having made a legacy to any person, takes it from him and revokes it, the legacy is thereby annulled; this revocation may be made expressly or tacitly.

§ 3.

A legacy is expressly revoked, when the testator, in the same will, or in another will, or in a judicial codicil, declares, by an express settlement, that he takes the legacy from the legatary, and revokes it; but this revocation cannot be made out of court, even though it should be made before five or seven witnesses.

The revocation may also be performed by indirect expressions; for example, when the testator declares, in a second will, or in a codicil, that the legatary is a rogue, and an ungrateful person.

§ 4.

The legacy is revoked tacitly, that is to say, if not by words or by writing, at least by deeds, (*ipso facto*), when the testator, after making his will, crosses and defaces the legacy on set purpose; which is always presumed, unless it appear that this happened without design, and by accident, in which case the legacy is not revoked.

2.) When the testator alienates the thing bequeathed, whether he do it through necessity or willingly; the legacy is revoked, even though the alienation were null in itself, or though the testator had after-ward

ward acquired the thing bequeathed by virtue of a new title, or though the legacy may be made in favour of a pious community, or though the testator may have only exchanged the thing left in legacy.

The case is otherwise, when the testator has laid the subject bequeathed in pawn, or has set it in farm for a time, though pretty long. In these cases the legacy subsists, and is not held as revoked; but the heir is bound to redeem the thing left in legacy, and to refer * the farmer to the legatary.

When the legatary alienates only a part of the legacy, the legacy subsists in that part which has not been alienated.

3.) When the testator, who has a debt to claim from a third party, bequeaths it to any one, and afterward exacts payment of it, in this case the legacy is revoked, even though the money may not be expended. It is likewise revoked, if, by the method of acceptance, he have acquitted the debtor of what he owed.

The case is otherwise, a) When it is the debtor who, wanting to clear with the testator, has paid him what he owed him: or, b) When the testator has demanded his payment only because the debtor did not pay the interest, or because the debt was not secure in his hands.

4.) When a testator has so changed the species and form of the thing bequeathed, that it cannot be restored to its first state; for thereby its species is lost. See part II. book II. title II. art. I. § 10.

5.) When the testator has consumed the thing bequeathed; for example, if, having left in legacy all his grain, all his swine, &c. he afterward use all the grain, cause the swine to be killed, &c.; the legacy is thereby tacitly revoked, unless he have bought other grain and other swine; in which case the heir shall be

[* The French word is *adresser*, to address, direct, refer.]

bound to deliver what existed at the time of the testator's death.

The case is the same, when the testator, after having bequeathed a house, destroys it, even though he should rebuild it on another area; but the legacy is not reckoned revoked when he makes considerable reparations on the house, or rebuilds it on the same area.

6.) When the testator and the legatary become enemies, even though the testator may have occasioned the enmity.

But it must be, in this case, an enmity which attacks the honour, or the life, or a considerable part of the fortune of one's adversary, or which is occasioned by a remarkable ingratitude; for example, when the legatary has accused the testator of an infamous vice, or has abused and beat him, or has threatened to do so, or has been guilty of adultery with the testator's wife, or has had a criminal correspondence with his children or his sisters.

This shall also be observed when such injuries are done to the testator after his death.

But the legacy is not revoked, if there be only some quarrels that may have happened between the testator and the legatary, and which hinder them from having confidence in each other, and from living familiarly together. If the testator and the legatary, after having conceived a mortal enmity against each other, happen to be reconciled, the legacy shall subsist.

7.) When the testator has no child at the time that the legacy is left, and one is born to him afterward.

§ 5.

It is also reckoned as a deed by which a legacy is revoked; when the testator transfers the legacy; for example, when, in the same, or in a second will, he gives

gives the legacy to another, or when, instead of the thing left in legacy, he bequeaths something else to the legatary.

This transference of a legacy may be performed in several ways; namely, 1.) When the testator transfers the legacy of one person to another, by saying, for example, *I give and bequeath to Seius the horse which I had bequeathed to Caius.* In this case, the first legacy made to Caius is revoked, even though the transference were invalid in itself, and though Seius were incapable of receiving by will.

Thence it follows, that we disapprove the sentiments of the lawyers, who gave their opinion, that in this case the legacy should be divided.

The case is the same when the testator bequeaths to any person, for example, a house, and orders him to restore it to Seius; if he afterward take the legacy from Seius, both legacies are invalid and without effect, by the revocation which the testator thereby makes of them.

When a testator transfers purely and simply to another person a legacy which is conditional, without making any mention of the condition, he is reckoned nevertheless to have also imposed it on the second legatary; which would not be the case if the condition were annexed to the legatary's person, and were to be performed solely by him; for example, when having bequeathed to any one a thousand rix-dollars, *in case he get himself received doctor*, he afterward bequeaths these thousand rix-dollars to another, without making mention of the condition, the legacy is pure and simple, especially if the second legatary have passed no course of study.

The second legatary is likewise bound to pay the burdens laid on the first legacy.

2.) It is said, in the second place, that a legacy is transferred, when it is conveyed not from the person of

of the legatary, but from the person of the heir, and the testator burdens another heir with paying the legacy; for example, when he appoints Caius and Mævius for his heirs, and after having ordered Caius to pay a hundred rix-dollars to Seius, he burdens the other heir, to wit Mævius, with paying that legacy, in this case Seius can demand the legacy only from Mævius.

3.) A legacy is transferred, in the third place, when the testator, in place of the thing bequeathed, leaves another to the legatary; for example, when the testator says, *I will and intend that Caius, instead of the estate which I have bequeathed to him, shall have the sum of a thousand rix-dollars.*

4.) A legacy is transferred, in the fourth place, when the testator bequeaths conditionally what he had bequeathed purely and simply. The effect of this kind of transference is, that if the condition do not exist, the legatary has not a right to demand the first legacy, which is reckoned revoked by this transference.

If then the legatary wanted to exact from the heir the first legacy, the latter would get the former cast in his demand by an objection of fraud, (*exceptio doli*); and if the legatary were in possession of the thing bequeathed, the heir might redemand it in a claim of right.

When a testator has made a legacy on one condition, and afterward leaves the same legacy on another condition, the first legacy is revoked, though the condition of the second legacy do not exist: thus when a testator bequeaths to any person a thousand rix-dollars on condition *that he shall marry Caius's daughter*, and when afterward he leaves him the same thousand rix-dollars *in case he build a house*, the legatary can demand the legacy only in the second case.

The case is the same when the testator leaves to
any

any one a legacy burdened with doing something, (*sub modo*), for example, of building a tomb for him, &c. and when afterward he imposes that burden on another legatary, it is only the last that can demand the legacy.

§ 6.

When a testator leaves a legacy to two persons, and revokes it with respect to one of the legataries, the other shall not have a right to demand the whole legacy, because we have abolished the right of accretion.

§ 7.

When a testator does not revoke the principal legacy, but only what is included in it, the principal legacy subsists; for example, when a testator bequeaths to his neighbour the servitude called *actus*, that is to say, of driving beasts of burden, or those who are going to pasturage through his estate, which includes tacitly the servitude called *iter*; that is to say, the right of a path or passage, and when afterward he declares that he is not to have the right of path or of passage, the legacy is indeed revoked as to this last servitude, (*itineris*), but it subsists as to the first, (*actus*), and the passage is allowed to the legatary only so far as it is necessary for driving beasts of burden, and those which are going to pasturage through the grounds mentioned.

§ 8.

A testator may also revoke the legacy only in part, and may order, for example, that of the hundred sheep, or of the hundred rix-dollars, which he has bequeathed to Caius, he is only to have fifty of them, in which case the legatary cannot demand more, unless the thing bequeathed be naturally incapable of division.

A R T. II.

Of the cases in which a legacy falls of itself.

§ 9.

A Legacy falls of itself, 1.) When the thing bequeathed happens to perish without any fault of the heir.

The legacy would nevertheless be ineffectual, even though afterward the subject bequeathed were restored. The case would be different, if, for example, the testator having caused the house bequeathed to be demolished, got a new house built on the same area, or intended to do so; in this case the materials which he may have acquired with this view would be included in the legacy; nevertheless the heir could not be obliged to rebuild the house on his charges.

When the house perishes but in part, the legacy subsists in the part which remains: thus when a man has bequeathed a house, and it happens to perish, the legacy subsists in the area on which it was built. The case would be different if the accessories only remained, which could not subsist without the principal thing. This is also the reason that in the case just mentioned the legacy subsists only in the materials.

2.) When the thing bequeathed is so changed by a *stranger*, that it is become of another nature, and cannot be restored to its first state. See above, § 4. n. 4.

But as the person who has caused its nature to be changed by specification is bound to pay the value of the materials, the heir ought to oblige him so to do, and deliver it to the legatary.

3.) When the testator bequeaths to any person things which cannot be left in legacy, for example, which belong

belong to the legatary himself, or to another, (*rem propriam vel alienam, &c.*) See above, part II. book VIII. tit. II. § 27. and *ibid.* § 31.

4.) When the legatary happens to die before the testator. The reason of which is, that the legacy acquires its force only by the testator's death, and that when he dies, the legatary already deceased is no longer in a condition to make acquisitions.

The case would be different if the legacy had been left to the legatary and *to his heirs*, in which case there are several legacies, and the heirs are intitled to claim the legacy by virtue of a right peculiar to themselves, (*suo jure.*)

5.) When the legatary happens to die before the condition be fulfilled.

6.) When the legatary will not have nor accept the legacy. See part II. book VIII. tit. II. § 41.

7.) When the legatary has already got from the testator in his lifetime, and after he made his will, the thing or quantity bequeathed gratuitously, (*ex causa lucrativa*), in which case the legacy falls also of itself.

§ 10.

When the whole will is annulled, the legacies cannot be valid, for they cannot be left but in a will. We have treated above, part II. book VII. tit. XVII. of the methods by which a will is annulled.

But legacies are valid, 1.) When the will is invalidated only with respect to the nomination of the heir. See above, § 4. n. 3.; or,

2.) When the will being null, for example, for want of an heir, the succession is nevertheless reckoned as accepted in law, (*ipso jure pro adita*); the reason of which is, that this regulation was made to support the legacies. See part II. book VII. tit. XV. § 23.

A R T. III.

*Of legacies conceived in obscure and doubtful expressions,
and of the way of interpreting them.*

(De rebus dubiis.)

§ 11.

WHEN a testator, in leaving legacies, uses terms which do not clearly and distinctly express his intention, they ought as much as possible to be explained so as the legacies may subsist.

I.) Regard must be had, in the first place, to the meaning which the testator used to affix to the expressions made use of in his will.

§ 12.

II.) If it do not appear in what sense the testator was wont to use the expressions which he has employed, they must, in the second place, be understood in their natural and proper sense.

§ 13.

III.) But if the expressions have different significations, they must, in the third place, be interpreted according to the meaning which they have usually in civil life, (*in vita civili.*)

§ 14.

IV.) But if the expressions be so obscure and doubtful, that it is not possible to guess their meaning, nor to give them a rational interpretation, the legacy in that case is null.

A R T. IV.

Of the case in which a legacy is invalid at the time of making the will, and in which the defect which rendered it null, happens to cease before the testator's death.

(De regula Catoniana.)

§ 15.

IT happens sometimes that a testator leaves a legacy which is invalid at the time that he makes his will, but that afterward the defect which rendered the legacy null happens to cease before the testator's death: in this case it is a question whether such a legacy can have its effect,

§ 16.

The Roman laws have established two rules, by the advice of Cato, from whom they are called Catonian rules. The first, That legacies that are not valid at the beginning, when the testator makes his will, cannot by course of time become valid, (*quod ab initio nullum est ex post facto convalescere non posse.*)

The second rule, That a legacy which in the beginning was valid, and which at the time of the testator's decease is found such as the testator could not have left it, if it had been such at the time that he made his will, (*si incidit in statum unde incipere nequit*), is null, in the same way as if it had been so from the beginning.

We shall now explain the two rules by examples.

§ 17.

Thus, 1.) When the testator was incapable of making a will, all the settlements made in such a will, and consequently the legacies, are null, even though

the testator may have afterward acquired the capacity of making a will.

2.) When the legatary was incapable of receiving by will at the time the will was made, he cannot demand the legacy, even though his incapacity may have ceased afterward; for example, if after having been proscribed at the time the will was made, he had been restored afterward.

3.) When the will is null originally; for example, when the children have been omitted and passed over, the will, and consequently the legacies, do not become valid, even though the children should be dead before the testator, and though thereby the defect may have ceased.

4.) When the testator bequeaths to the legatary a thing which belongs to him already, the latter has not a right to demand the legacy, even though he may have alienated the thing before the testator's death, and though consequently the defect found in the legacy may have ceased.

5.) When the testator bequeaths to the legatary a thing belonging to another, (*rem alienam*), the legacy is not valid, even though the testator may have acquired the thing afterward gratuitously, and though it may consequently have ceased to belong to another.

6.) When a testator bequeaths to any one the right of patronage, without having obtained for that purpose the consent of the consistory, the legacy is not valid, even though the testator should afterward obtain that consent.

§ 18.

This rule admits an exception, 1.) When the legacy is not pure and simple, but conditional. The reason of which is, that the legacy acquires its validity only when the condition exists,

Thus

Thus when a testator bequeaths a hundred rix-dollars to a pupil in case he marry Caius's daughter, that legacy is null all the time that he is a pupil, because a pupil cannot marry; but if he arrive at the age of puberty in the testator's lifetime, and if he marry Caius's daughter, the legacy subsists.

This exception likewise takes place when the legacy includes a tacit condition; thus when a testator bequeaths a portion to a bride, that legacy includes the tacit condition, namely, *in case she be married*.

2.) This rule also admits an exception in all the cases in which the legacy does not take place till after the day of the heir's entry, (*a die aditæ hereditatis*), and that it consequently does not acquire its validity till after that day; see above, part II. book VIII. tit. XVII. § 2.; for in these cases it is sufficient if the legatary be then capable of receiving by will; whence it results that the legacy becomes valid by course of time.

§ 19.

An example of the second rule is, when the legatary is at the time that the testator makes his will capable of receiving a legacy, and when afterward, and before the testator's death, he is proscribed; in this case the legacy which was left to him is null: the reason of which is, that the legatary has fallen into a state which would have rendered him incapable of receiving by will, if he had been already in that state at the time of making the will,

A R T. V.

Of the cases in which legacies are reckoned as if they had not been left or written.

(Pro non scriptis.)

§ 20.

AN heir is not bound to pay a legacy which the laws would have reckoned as if it had not been left or written, (*pro non scripto*), such as the legacies following, namely,

1.) When the legacy is expressed in terms so obscure and dubious, that it is not possible to guess the testator's intentions, nor to give a rational interpretation to his words. See above, art. III.

2.) When a testator leaves a legacy to a person who is not in the world, or bequeaths a thing which does not exist.

3.) When the condition of the legacy fails.

4.) When the person who receives a will declared to him verbally, or who writes out a will fair, inserts a legacy to himself, or makes one to his relations, either to his children, to his wife, or to his brothers and sisters, which legacy is consequently written with his own hand. Nevertheless the case would be otherwise, if the testator certified with his own hand below the record, or the fair copy of the will, that the legacy mentioned was therein inserted by his consent, and because he had so ordered.

A person who shall, in this manner, insert a legacy, and who shall not get annexed to it, as has been said, the testator's declaration, *that the thing was done by his order*, shall, besides, be arbitrarily punished, even though

though he could prove that he did nothing but with the testator's consent, and by his order.

This shall likewise be observed in privileged wills, as well as in the will of a wife in which a husband has inserted a legacy for himself.

5.) When a legatary is nominated guardian by the testator, who leaves him a legacy, and when he will not accept the guardianship, in this case the legacy is reckoned as not written, (*pro non scripto*), even though the legacy may not have been left on account of the guardianship.

§ 21.

All those legacies remain in the mass of the succession, and do not fall to the share either of the legataries, who are conjoined, (*re conjunctis*), or to the exchequer; but they belong either to the heir nominated or to the substitute, or to the heirs intestate or at law.

A R T. VI.

Of the cases in which a legatary is deprived of the legacy on account of unworthiness.

(De his quæ ut indignis auferuntur.)

§ 22.

A Legacy is annulled when the legatary renders himself unworthy of it by a crime, or by his ingratitude to the testator; in this case he is deprived of it, as being unworthy, and the legacy falls to the exchequer, which snatches it, so to speak, from the legatary. This is the reason that that kind of legacies are called *ereptitia*: we shall now enumerate their different cases.

§ 23.

§ 23.

A legatary is then deprived of the legacy as being unworthy of it,

1.) When, after being favoured in a first will, he has hindered the testator from making a second; or,

2.) When he has forced the testator to make the will, in which he left him a legacy. Likewise,

3.) When the legatary has made an attempt on the life of the testator, or on that of his wife, of his father and mother, of his children, of his brothers and sisters, and of his father and mother by alliance; and he would be still more unworthy of the legacy, if he even assassinated any of those persons, or had been the occasion of their death. Likewise,

4.) When he has wounded the testator, or has abused him with blows, or threatened to do so; or has cursed him; or has accused of a grievous crime either the testator or his wife, or his father and mother, or his children, or has incited other persons to raise such an accusation against them. See above, part II. book VII. tit. V. § 5. n. 3. and 4.

5.) When he has committed adultery with the testator's wife, or has had a criminal correspondence with the daughters, or with the sisters of the testator; though even that may not have happened till after his death.

6.) When a father leaves a legacy to his son whom he disinherits at the same time, and when the son, suing to get the will annulled by a complaint of undidfulness, is cast in the suit. The reason of which is, that the son, by making that complaint, accuses his father of having acted against common sense and reason, in excluding him from the succession, which is a very grievous injury. The case would be different, 1) If the son made the complaint only by virtue of his employment, (*vi officii*), and, for example, in

in quality of a guardian; 2.) When the son does not declare the will undutiful, but only pretends to prove, that it was not made according to the laws. For in this case the son defends the rights which are his by the laws, contrary to the tenor of which the defunct was not entitled to dispose of his effects. 3.) When the legatary desists from the complaint before the sentence be pronounced and published.

7.) When the legatary suppresses the will, for example, to deprive his heirs of the succession.

8.) When the legacy is left to a person with whom one has married contrary to the prohibition of the laws.

9.) When the testator imposes on the legatary, the obligation of delivering the legacy to another, who is excluded from it by the laws.

§ 24.

Excepting in the cases just mentioned the exchequer has no right to appropriate to itself a legacy, under pretext of the legatary's unworthiness, and a legacy which is invalidated or annulled on any other account, remains in the mass of the succession.

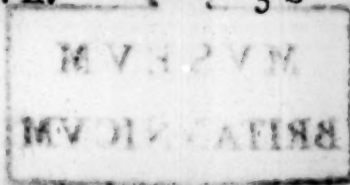
ART. VII.

Of the cases in which a testator has been mistaken in the person of the legatary, or in the thing bequeathed.

§ 25.

IN fine, a legacy is annulled, a) When the testator has been mistaken in the person of the legatary; for example, when intending to leave a legacy to Caius, he has left it to Titius.

The case would be otherwise, if the legatary's person



son being certain, the testator had only been mistaken in the name, or, if he had only given him a false designation, or addition, or had alleged as a motive of his settlement, a cause afterward discovered to be false.

b) When the testator has mistaken in the thing bequeathed itself, and has left in legacy a thing which he has not of his own; for example, when, having bequeathed a horse, there are none in his possession at his decease; or when, having bequeathed the wine which he has in his cellar, there is none found there after his death. Likewise, when he bequeaths to Caius the 100 rix-dollars which he has in his strong box, and when no money is found in the strong box, &c. In all these cases the heir is not bound to pay the legacy.

c) When the testator has bequeathed a sum or quantity, and having added to the legacy the estate or the strong box, out of which the quantity is to be taken, it appears that the testator designed only to bequeath the product of the estate, or what is in the strong box, *taxationis gratia*; though the testator may have been mistaken in the quantity, the heir is bound to deliver only the product of the estate, or what is found in the strong box. See above, part II. book VIII. title II. § 19.

Thus, when the testator has bequeathed the six barrels of wine, which his vineyard shall produce this year, and, when two barrels only are got out of it, that mistake shall only annul the legacy in part, the heir being bound to deliver no more than the produce of the vineyard.

The End of the SECOND VOLUME.



T O

The RIGHT HONOURABLE

J O H N E A R L of B U T E;

Whose inclinations concur with the duty of his
office to advise and promote good Laws:

The following TRANSLATION of those
of the KING of PRUSSIA,

Is most humbly inscribed by

His LORDSHIP'S

Most obedient, and

Most humble servant,

The TRANSLATOR.

The Right Honorable

JOHN EARL OF BUTE

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